

MISSISSIPPI LAW JOURNAL

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ERRATA

Please note the inadvertent misspelling of the student-author's name in *Constitutional Law—First Amendment—Application of Public Accommodations Law Violates First Amendment When Organization's Expressive Activity is Significantly Burdened*, 70 MISS. L.J. 441 (2000).

On the title page and on page 455, the name now reads,

Kelly Carter.

The corrected name should read:

Kelli Carter.

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INTRODUCTION TO POVERTY LAW SYMPOSIUM

On March 30 and 31, 2001, the authors of the pieces in this volume presented their articles to an eager audience at the University of Mississippi School of Law. The first event of its kind at Ole Miss, this symposium brought together students, faculty, practitioners and national scholars for a candid discussion about issues facing the poor not only in Mississippi, but across the country. Thanks to the tireless efforts of Professor Debbie Bell, students and scholars alike gained invaluable insight into a frequently overlooked facet of the law, as well as an entirely new perspective on poverty, an area with which the majority of those in attendance had never been faced. While the symposium centered on discussion and debate, the event also recognized the students who had already put its tenets into action by providing legal support and advice to individuals seeking relief through the law school's poverty law clinic.

The event was a high point for the *Mississippi Law Journal* and the law school as a whole. First- and second-year law students flooded Professor Bell with requests to be a part of the poverty law clinic, and third-year law students found a renewed responsibility to engage in *pro bono* work as they began their new profession. No audience member left unchanged, and the *Mississippi Law Journal* was proud to be a part of the symposium.

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THE POWER BEYOND BORDERS

Lucie E. White*

The theme of this essay is both a metaphor for a set of three related lawyering dilemmas and a huge, here and now, in your face insult to human justice. The theme of my talk today is the guarding of borders. The message I want to set forth is simple, and it is this: The biggest challenge to social justice in the twenty-first century is the challenge of decoupling the work of doing justice from the work of guarding borders. How can we affirm who we are, and seek social equality in the communities and nations where we live without taking part in the *injustice* that goes with the guarding of borders? How can we move toward practices of lawyering, sociolegal policy-making and citizenship that do not depend on the guarding of borders?

When I talk about the challenge of doing justice without guarding borders, I am talking about three different, but closely interwoven kinds of borders. Each one gets "guarded" in different ways. Yet these three kinds of borders buttress one another, so that the guarding of any one of them compels us to guard the others. And, conversely, opening up any one of these borders can start a circle of changes that leads toward a more open—and more just—social world for us all.

What are these three kinds of borders? The *first* are the literal political borders of rich, first world nations like America, as well as the invisible borders of race and class privilege that continue to segregate some of those rich nations' own residents from the prosperity that others enjoy. The *second* are the bright-line legal rules that we use to define the boundaries of the legal entitlements that we sometimes equate with social equality. And the *third* are the tight ways we have

* Louis A. Horvitz Professor of Law, Harvard Law School. B.A. 1972, Radcliffe College; J.D. 1981, Harvard Law School.

of defining the appropriate roles for lawyers and uses of law in the work of doing justice.

I want to talk first about the interplay between the first two of these kinds of borders. Then I want to show a few pictures to evoke some of the exciting new lawyering practices that are emerging in our low income communities to open up the third. I want to suggest that these innovative lawyering practices are creating powerful moral pressure and social movement for dismantling what Douglas Massey and Nancy Denton have called "American Apartheid"¹ and for promoting legal scholars to rethink the concept and design of social entitlements and national boundaries, so that protecting the security of some people does not leave others out in the cold.

The first kind of borders that I am talking about are the real borders of rich northern nations like America. I am talking here about our southern border with Mexico, the beaches of Puerto Rico and Southern Florida and the ports of New York and San Francisco. As we all know but sometimes try to forget, these borders are guarded by our government with high speed boats, attack dogs and guns. And that "law enforcement" process regularly sweeps up poor folks from Chiapas and Port au Prince and Shanghai and Dakar, locks them up and deports them.

The second kind of borders I am talking about are less literal but still very real. These are the legal hard lines that mark the boundaries of eligibility for our means-tested social entitlement programs like Food Stamps, Medicaid and Social Security. These hard-line eligibility rules—these borders—entitle our *own* less well off citizens to a share in our country's great wealth. Thus, these programs protect us, as a nation, from the ugly extremes of poverty that are eroding the social fabric of emerging democracy in less wealthy nations to the south.

Yet at the same time that these legal borders entitle a closed universe of "citizens," they also mark off a much larger universe of persons as ineligible for these programs' largess.

¹ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1994).

These excluded persons live both inside and outside of the literal borders of our nation. Some are excluded from these programs because they do not satisfy hard-line legal rules that select among groups of impoverished persons on the basis of factors such as citizenship, the capacity to fill out arcane paperwork correctly or the emotional strength to show up on time for a dangerous and demeaning workfare job. Others are excluded because they fear the stigma or exposure that go with the benefits that these programs provide.

We have been taught that laws that are shaped according to this border-guarding logic are a good thing for social justice advocates to fight for and preserve. We have been taught to equate these border-guarding legal formulas with fundamental social and economic rights. Indeed, we have been taught that the *only* imaginable way to realize the dream of universal social citizenship is through such hard-line, border-guarding notions of legal entitlement, rather than through more de-centered, porous-bordered, *open-system* alternatives.

Thus, as good poverty lawyers, we have learned to avert our eyes from the hard truth that our very best entitlement programs impose rules that close out some persons so that others can be better off.

From an insider's perspective, such hard-line rules of social entitlement seem necessary to achieve social equality here at home, even though they depend on tightly guarded borders to preserve their fiscal integrity. We have been taught to believe that although this is a tragic cost, it is one that we must simply learn to bear in order to preserve and enhance social justice. But from the perspective of those who are excluded by this border-guarding logic, the picture looks different. From that vantage point, the way of life that is preserved inside of that fortress is shored up, and paid for, in human lives.

Before I talk about the third kind of borders, I want to set forth a few images that evoke the interplay of the first two.

The first comes from a *New York Times* article from March 18, 2001, entitled "Migrants Take Their Chances on a Harsh Path of Hope." It reads:

[T]he number of migrant deaths along the southern border went from 261 in . . . 1998 to 369 in . . . 2000. . . . More than 40 percent of all border deaths last year were due to exposure to heat or cold.

...
"It's obvious what's happening," says [an INS researcher]. . . . "No matter how much control you have, it doesn't appear to stop the flow of immigrants. It only controls how much it costs them, where they do it and how they will die."²

The second comes from an interview I conducted a decade ago with a Mexican woman whose path into this country from Mexico had taken her across Interstate Five south of San Diego. In a recent talk I gave at Syracuse University Law School in New York, one of the first year students in the audience told me that while he was an undergraduate in San Diego, he had seen a Mexican woman and her child killed while crossing that freeway. He told me that after witnessing that death, he no longer knew what to think about our country's immigration policies, or the right path to social justice.

I first met Nela Marquez ten years ago, when I was doing an ethnographic project on women who were active as parent volunteers in a Los Angeles Project Head Start preschool program. At the time that I interviewed her, Ms. Marquez was a legal resident of the United States, the mother of three children and a parent leader in her children's Head Start center. In one of our conversations, she told me about her journey into America.

In rural Mexico, where she grew up, Nela Marquez was the sixth of eight children. She went to work as a child, cleaning rich people's houses and caring for their needs. When she got older, she took a job in a tortilla bakery. This was not a good job for her, because, in her words, her boss was "bad." She used

² Tom Zeller, *Migrants Take Their Chances on a Harsh Path of Hope*, N.Y. TIMES, Mar. 18, 2001, at D14.

to cut her fingers a lot and burn her hands. She explained, "You can't stop working, even if you cut your hands. You just grab something because you got to be faster. You had to be faster than the machine." The money making tortillas was not enough to feed her mother, who was too sick to work, or to get clothes for her younger brothers and sisters.

So, when she was nineteen, Nela Marquez decided that she had to go north to Los Angeles. She had two cousins and a sister in L.A., but she was still terrified to make the trip. Her journey took her across the freeway south of San Diego, rather than through the desert. The is how she described it to me:

I was lucky. I was really lucky. It's in my mind all the time. I remember the person that helped me escape.

"You don't stop here. You see those cars coming. Let *them* stop. But *you don't stop*." I didn't know why he was saying that. I didn't know the freeway. I didn't even know what the freeway was. They told me "*You don't stop here*. You make them stop. You run and run. You run and run and run." And I say OK. OK. I was so tired. So tired.

My sister told my cousin to let me have pants. But they forgot to tell me. So I was wearing a skirt. And shoes like this. And I was running and running and saying, "You go ahead. I can't. I can't go. I can't make it no more." It was the middle of the night. One o'clock in the morning. I was so scared.

In Los Angeles they used to have helicopters, horses and motorcycles. The first night, the first week when I was here, I remember, in my sister's house, I was eating and then . . . the airplanes I used to go under the table when the airplanes came. I used to grab my sister. I used to be so scared.

After Ms. Marquez received amnesty from the 1986 immigration law,³ she worked hard to help other Mexican women recover from the trauma of their journeys and get actively involved in their children's education. Her Head Start center, which had a very high share of undocumented Mexican families, consistently received recognition from the program's cen-

³ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

tral office for its very high levels of parental involvement.

* * *

Next, I want to draw from my current work with the Kitchen Table Conversations Project. This is a weekly support group of about fifteen very low income women that my students and I have brought together each week for the last two years in collaboration with the City of Cambridge's Women's Commission and the Radcliffe College Public Policy Institute. Most of these women are mothers of young children. They are no longer eligible for welfare under the Massachusetts "two years and you're out" welfare reform law.⁴ Therefore, they are struggling to make ends meet in full-time low wage jobs.

One of the activities that we have been involved in is a national project that is calculating realistic household budgets for single-parent household types in different parts of the country. In the Boston area, the project has determined that a single mother and two young children would need to work full-time at a wage-level of over fourteen dollars an hour to cover her family's basic needs.⁵ This figure is so high because code-compliant housing and licensed child care are very costly—and high quality—commodities in the Boston area. A single parent family would need a lot of child care because, without any public assistance, the parent would have to work very long hours to pay all the bills.

The goal of the family economic self-sufficiency project, as it is called, is to use this realistically calculated standard of living as a baseline for seeking income-support and tax policies that will guarantee a decent life for all of our citizens who work full-time. The women who come to the Kitchen Table feel entitled to a decent standard of living in this rich country, especially since they are working outside the home. They feel that this is their basic human right. Their kids should not have to get picked on at school for wearing the wrong kind of sneakers or left home alone after the school day is over. Our local coalition plans to use our realistic cost-of-living numbers to

⁴ Act of Feb. 10, 1995, ch. 5, § 110(f), 1995 Mass. Acts 41.

⁵ MASS. FAMILY ECONOMIC SELF-SUFFICIENCY PROJECT (MASSFESS), *THE SELF-SUFFICIENCY STANDARD: WHERE MASSACHUSETTS FAMILIES STAND* (2000).

lobby our state legislature for more generous child care and housing and health care subsidies, more generous state-level earned income and dependent-care tax credits and a living wage law. The Kitchen Table women *know* that they will be considered loony if they lobby our state legislators to extend such generous social entitlements to undocumented immigrants, or even to enact aggressive outreach programs to ensure that all legal residents who are eligible for benefits actually receive them.

Thus, these women know not to mention the immigrant word as they work for safety-net legislation. For unlike fair labor standards, which legislators will readily extend to undocumented immigrants in order to protect business from unfair competition from domestic sweatshops, there is no such incentive for legislators to extend social entitlements to new immigrants. Rather, as the 1996 welfare and immigration reform laws⁶ made unmistakably clear, the domestic political logic runs toward excluding immigrants from social entitlement programs, both to conserve our wealth for our "own" people, and to deter destitute people from entering this country.

There is a "catch-22" going on here. The Kitchen Table women want the state legislature to guarantee them a standard of living that will ensure their dignity and inclusion in this wealthy country. Yet because *everything*, including care, must be secured with dollars in this plastic-and-cash economy, the laws that these women seek in order to guarantee their dignity and inclusion take the form of close-system loops of tax-and-spend redistribution. Such laws have been seized on to work up a ferocious backlash—a "tax revolt"—among well-off working people in this country. But even for the few elites who have not been caught up in this "me-first" frenzy, cash entitlements for poor people only make sense if the number of people who can claim benefits is under their government's tight control. The notion of enacting generous income entitlement laws and then opening up the borders of eligibility for those

⁶ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

tral office for its very high levels of parental involvement.

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⁴ Act of Feb. 10, 1995, ch. 5, § 110(f), 1995 Mass. Acts 41.

⁵ MASS. FAMILY ECONOMIC SELF-SUFFICIENCY PROJECT (MASSFESS), THE SELF-SUFFICIENCY STANDARD: WHERE MASSACHUSETTS FAMILIES STAND (2000).

lobby our state legislature for more generous child care and housing and health care subsidies, more generous state-level earned income and dependent-care tax credits and a living wage law. The Kitchen Table women *know* that they will be considered loony if they lobby our state legislators to extend such generous social entitlements to undocumented immigrants, or even to enact aggressive outreach programs to ensure that all legal residents who are eligible for benefits actually receive them.

Thus, these women know not to mention the immigrant word as they work for safety-net legislation. For unlike fair labor standards, which legislators will readily extend to undocumented immigrants in order to protect business from unfair competition from domestic sweatshops, there is no such incentive for legislators to extend social entitlements to new immigrants. Rather, as the 1996 welfare and immigration reform laws⁶ made unmistakably clear, the domestic political logic runs toward excluding immigrants from social entitlement programs, both to conserve our wealth for our "own" people, and to deter destitute people from entering this country.

There is a "catch-22" going on here. The Kitchen Table women want the state legislature to guarantee them a standard of living that will ensure their dignity and inclusion in this wealthy country. Yet because *everything*, including care, must be secured with dollars in this plastic-and-cash economy, the laws that these women seek in order to guarantee their dignity and inclusion take the form of close-system loops of tax-and-spend redistribution. Such laws have been seized on to work up a ferocious backlash—a "tax revolt"—among well-off working people in this country. But even for the few elites who have not been caught up in this "me-first" frenzy, cash entitlements for poor people only make sense if the number of people who can claim benefits is under their government's tight control. The notion of enacting generous income entitlement laws and then opening up the borders of eligibility for those

⁶ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

Holland and Britain and America. In his vision, these people would dissolve those guarded borders and free up the gold that, since the days of slavery, had been hoarded inside of them.

So there is a perverse dynamic between guarding our borders and shoring up, through hard-line notions of legal entitlement, the inflated notions of necessity that define our way of life. From the inside, those notions of necessity seem natural. They seem like notions that promote social equality. And they do. Yet from the outside, those same notions of necessity, and the hard-line laws that construct and promote them, seem like the latest apology for a long history of race-linked subordination.

I want to conclude by talking about a third kind of guarded borders: the guarding of rigidly conventional boundaries of our own professional roles and practices as poverty lawyers. Most of our notions of what poverty lawyers should *do* refuse to depart from the image of the lawyer as a man who talks to clients across a desk and then goes to court to litigate on their behalf. This normative poverty lawyer brings two kinds of lawsuits: service cases to prove the eligibility of individual clients to hard-line social entitlements, and impact cases to stretch the boundaries of those programs to the outer limit that the law allows, so that they admit a few more people. When this normative poverty lawyer engages in legislative advocacy, he tries to get more of these laws on the books, or to change their rules of eligibility to make them more generous.

Over the last decade, a generation of creative young lawyers have redrawn this picture through their own practices. They have left the safety of their offices and sought out the places where the most disadvantaged in our society live and work. They have determined to work *with* those people, even if the law does not appear to give them any options. Thus, these young lawyers have given up the secure identity of the lawyer's traditional role, deciding, instead, to join hands *with* the excluded, on an open road toward justice.

These lawyers have challenged the guarded borders of the lawyer's traditional role in three ways. First, they have challenged the rigid border of professional distance that separates the lawyer from his client, and have sought out creative ways

to work collaboratively with clients and client groups. Second, they have challenged the rigid line that separates the work of *lawyers* from the work of other social justice practitioners. They have refused to agonize about whether work they do is *really* law. Instead, they have learned to use their skills and training to do what the situation calls for, regardless of whether an organizer, social worker, therapist, counselor, neighbor or friend might do that work, in the abstract, in neatly role-segregated world. At the same time that they have dared to intrude *into* other professional roles, on occasion, they have devised ways to join with those other professionals in innovative social justice projects, thus loosening up those rigid role boundaries from without as well as within.

And third, these border-defying lawyers have challenged the geographical and institutional boundaries between their own law offices, or university-based law school clinics, and the places where low income people live and work. As these young lawyers have joined with the most marginalized persons and communities, they have begun to *feel*, for themselves, the injustice of hard-line entitlements and guarded political borders.

Because pictures speak much more strongly than words, I include a few photographs of law students engaged in this kind of work. The occasion was the spring of 1997, after the 1996 federal welfare reform law had cut legally documented elderly and disabled immigrants off of Supplemental Security Income (SSI) benefits. The scene is a food pantry in Cambridge, Massachusetts. A group of law students and community workers are meeting with elderly immigrants to brainstorm about strategies for responding to their threatened SSI terminations. The group, working with other grassroots groups around the country, successfully pressured the federal government to back down on this particularly poisonous feature of the welfare reform law.

These young lawyers felt compelled to break out of the boundaries of the traditional lawyer role in order to do justice for clients who had few or no rights under conventional entitlement formulas. Thus, the first borders that these young lawyers have challenged are the rigid boundaries of the traditional lawyer's role. Once these borders were challenged, the lawyers' own feelings of empathy with their clients drove them to think

critically about the hard-line boundaries of conventional social entitlements and the guarded borders of rich nations. Their new thinking about legal entitlement moves in the direction of using law to help communities build themselves up, in multiple ways, from the inside out. Their new thinking about national boundaries moves in the direction of political regimes in which people—as well as goods—are presumed to have the right to move freely across political borders.⁸

I think it is no accident that these young lawyers have often worked with disenfranchised immigrants. Their creative and committed work with these people has gained them wide public recognition because their work so clearly evokes very basic notions about human dignity and social inclusion. Their work has signaled that when guarded borders denigrate and exclude human beings, then it is the logic behind those borders, rather than the bodies of those persons, that pose a threat to justice.

⁸ See JOHN P. KRETZMANN & JOHN L. MCKNIGHT, *BUILDING COMMUNITIES FROM THE INSIDE OUT: A PATH TOWARD FINDING AND MOBILIZING A COMMUNITY'S ASSETS* (1997).

POVERTY AND WELFARE POLICY IN THE POST-CLINTON ERA

*Peter Edelman**

I feel privileged to participate in this symposium, and I want to congratulate Professor Deborah Bell and all of the sponsors and everyone who had a part in making it happen. I also want to congratulate Professor Bell and the law school on the important and effective poverty clinic that is available to students here. It gets concrete assistance to people and is a model for three significant propositions about lawyering for the poor: one, that improving public policy is an appropriate part of poverty lawyering; two, that effective lawyering for the poor should be synergistic with efforts to empower and organize people to advocate on their own behalf; and three, that the right agenda is fairness for all lower-income people, whether or not their income is technically below the poverty line.

This is an important time to talk about people in need. There have been major changes recently in public policy toward those in need, and we have seen enough of their effect to be able to discuss the next steps. We have a new President and Congress. A recession is looking more probable by the day. And the 1996 welfare law is coming up for reauthorization in 2002. So this is a good time to look at how we are doing and what we need to do.

The issue frame for policy debate and action should not be just welfare or even just poverty. Even if poverty were appropriately defined, and I believe the correct figure would be much higher than the current \$13,000-plus poverty line for families of three, it would still be apparent that millions of

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people who are not poor are nonetheless struggling just to get by even though they are working as hard as they can. Everyone who does not get a fair shake in this country should be the focus for action, without losing special attention to those who are worst off. One child in six is still poor even by the inadequate way poverty is measured and even after the phenomenal prosperity of the past few years. Forty percent of the poor, or more than twelve million people, have incomes below half the poverty line, or below about \$6750 for a family of three.

The Kerner Commission warned in 1968 that we were in danger of becoming two societies permanently divided by race. We have made progress on that front, but we have become two societies in a different way, divided by huge gaps in income that are getting worse rather than better. It is past time to focus on the injustice of this.

How did this come to pass? Why are we making such inadequate progress?

The answer lies heavily in what has happened to the American economy over the past thirty years, compounded by continuing disparities based on race and ethnicity, and compounded further by the failure of public policy to respond adequately. Everyone knows that manufacturing jobs have disappeared to other countries and to automation and have been replaced by much lower paying service jobs. We have not digested fully that this is directly connected to why such a large number of people are working and still losing ground. The American labor market is structured so that millions of jobs do not pay enough to sustain an average-size family.

A surprising proportion of the work force actually earns less, after inflation is taken into account, than they did three decades ago. The further down the income ladder one goes, the greater the loss has been. Seventy percent of poor children live in a home where someone has income from work. Twenty-five percent live in a family where someone has a full-time job and the family is still poor. We may have a mental picture that poor people are people who do not work. That is not the case. Poverty is heavily associated with work.

African-Americans and Hispanics continue to lag behind.

Nearly a quarter of each group is still poor. These numbers are better than they used to be, but the gap is still large. The poverty rate among whites is around ten percent. Non-Hispanic whites constitute the largest number of the poor, but poverty is significantly associated with race and ethnicity.

The changes in the economy have eroded the income and security of millions, but the conservative position has been to offer a much simpler explanation: welfare. The conservative argument is that poverty is simply a failure of individual responsibility, encouraged and reinforced by the availability of welfare. If welfare is removed, the argument continues, then the poor will go out and get jobs. This explanation, pushed assiduously by conservative advocates, finally carried the day politically in 1996 with the enactment of a new national policy structure for welfare.

The previous welfare system did need to be reformed. Too many people stayed on the rolls too long, primarily because too little was done to help them get and hold on to jobs. A three-dimensional antipoverty strategy focusing on jobs and education, and on improving the conditions of life in neighborhoods where poverty is concentrated, would have reduced the welfare rolls (and poverty) in a constructive way. The left and the right can agree there was too much welfare. The difference is in the remedy.

What was enacted in 1996 is not good policy. It is a block grant, which means that states do not have to have a system of cash assistance for families with children at all, and if they do they can deny assistance to anyone they like. Some states have done so, with gusto. No family can receive federally financed cash assistance for more than five years during the time any given mother's children are growing up, regardless of recession or other reasons for continuing need. (There is an exception for twenty percent of the remaining caseload once the time limits are effective, but most experts believe this will be inadequate, and states have no obligation to make use of it in any event.) Because the new law is a block grant, states are free to have shorter time limits, and many do. They can have virtually any sanction and termination policy they want to push people off the rolls, and virtually any policy they want to

deny aid to applicants when they walk in the door asking for help.

The welfare rolls have been pared by more than half since their peak at a little over fourteen million people in 1994. Based on this fact alone, adherents of the new law have proclaimed its success. In fact, the story is more complicated. One would like to know how many of those who left the rolls are working and whether they have escaped poverty, and how many former recipients have neither a job nor cash assistance. One would wish to know how many are better off and how many are worse off.

An amalgam of the "leaver" studies that have been conducted around the country suggests, with variation among the states, that on any given day perhaps sixty percent of the former recipients have a job and forty percent do not. Because people get jobs and lose jobs all the time, the number who have a job in the course of a year is larger than sixty percent, but because many of the sixty percent will lose the jobs they now have, the number whose employment will be steady is much less than sixty percent.

The average wage of those "leavers" who have a job at a given moment is about \$7.00 an hour, and the average amount of work they have is around thirty-two hours a week. This means that many people working part-time are counted as employed, and are unlikely to have gotten out of poverty, and many working full-time are still poor, especially if they have three or more children. The Earned Income Tax Credit gets a single parent with two children who has a full-time year-round minimum-wage job out of poverty, but not a family with three or more children. It is not difficult to articulate policies that would raise the income of these low-wage workers, so the problem they present is a better one than the problem of a person who has no work at all, but their situation can hardly be called a smashing success. And it is far from clear that the political will currently exists to see that even this "deserving" group receives an adequate income.

Of the relatively small number who are steadily employed and earn an income that exceeds the poverty line, many are experiencing a new problem: the loss of benefits at a rate that

exceeds the growth in their income. This tends to happen, depending on the size of the family, at incomes of about \$15,000 to \$20,000. The phase-down of the Earned Income Tax Credit, food stamps, child care, health coverage and housing assistance can add up to a tax rate in excess of 100% for people who had thought their lives would be much better with their increased income. This problem is only now coming into focus, and deserves careful study and action. In addition, many of the former recipients who are success stories in income terms get there only by holding down two jobs, and end up with little time to be good parents to their children.

The most disturbing group are those at the bottom, who have little work or no work at all and were either sanctioned off the rolls or found they could not get assistance when they went to the welfare office. The latter, a practice in many states, is called "diversion." Because there is no longer any legal entitlement to assistance, the front-line worker can tell a person to look for a job before her application for help will be considered. In some places the policy is to require a person to show she has been turned down for thirty or forty jobs before she can even apply for welfare.

The forty percent who have neither work nor welfare on the date they were queried add up to a large contingent nationally: more than a million women and more than two million children. Government figures show that the ten percent of single-parent households with the lowest income actually lost about fourteen percent of their income from 1996 through 1998 because their losses of cash assistance and food stamps exceeded their gains in earnings. The average income of the forty percent of the poor with incomes below half the poverty line, those in what is called "extreme poverty," went down over the same period of time. It is difficult to say that a policy is a success when it produces this much injury.

The losses of food stamps and Medicaid are often illegal. The 1996 law did not change the eligibility of families with children for food stamps and Medicaid. Nonetheless, the food stamp rolls have declined from about twenty-eight million people nationally to about eighteen million at present, and experts estimate that only about half of this drop is due to the

improvement in the economy. The Medicaid declines are smaller, partly because they have been offset by enrollment drives for the Child Health Insurance Program (CHIP), which was enacted in 1997. Front-line workers, pressed to push recipients into the labor market, are often confused about what is allowed under the new system, and recipients, believing that all eligibility rules have changed, think they no longer qualify. In some places the story is more nefarious, with front-line workers instructed not to tell people of their rights unless a specific question is asked.

If more than three million people have disappeared in the sense of having neither a job nor welfare, and if we know they are poorer than they were before, what happened to them? Obviously they are not all homeless. Most of them probably moved in with extended family, but one wonders how stable those arrangements can possibly be, especially with a recession looming and layoffs more than possible for those in the extended household who do have work. Some no doubt married. Some moved in with men they should not have moved in with. Some resorted to illegal activity. And the homeless shelters for women and children are overflowing in nearly every major city. This has also occurred because of the recent extensive inflation in the cost of rental housing, but the loss of assistance is a major factor.

About six million people remain on the welfare rolls. A disproportionate number of the two million adults involved have been unable to find work, or have clung to welfare because they have a disabled or chronically ill child or aged or infirm relative. They are, on the whole, less educated, and have less work experience and more personal problems. There is considerable depression here, much learning disability and more of a problem with alcohol or illegal drugs. Time limits loom and a recession seems imminent. Experts believe the twenty percent exception to the time limit will be inadequate to respond to this group.

All of this is a composite national picture. There are better states and there are worse states because the new law is a block grant which gives states great flexibility (even though its prevailing ethos is a strong suggestion that states

push hard to reduce the size of their welfare rolls by whatever means possible). The better states respond to people as individuals. They encourage and even push people to work, but they make a serious effort to see that people get the training, the child care, the health coverage, the transportation help and whatever else they need to succeed in the work world. And they are sensitive to the reasons why some people are not in a position to work. The worse states have time limits much shorter than the federal five years, feature sanction, termination and diversion policies designed to pare the rolls regardless of whether a recipient or applicant has a job, do little to provide the supports that would enable new workers to keep their jobs and get out of poverty and are insensitive to individual family and personal situations that get in the way of work outside the home.

It is important to understand that the better states were experimenting with new welfare-to-work initiatives before the new law was enacted and had received waivers of then-applicable restrictions from the federal government so they could try out their ideas. What the new law did was give permission to the more punitive states to undertake policies that the federal government was unwilling to permit under the old system.

Perhaps the biggest issue of all is what happens to the children. The individual stories emanating from the field commonly feature jobs lost because of nonexistent or faulty child care, problems arising because a child is sick or disabled and terrible tensions and worries for mothers torn by impossible conflicts between the need for long hours of work and the commitment to love and care for children. From Congress all the way down to front-line workers, concerns about what happens to the children have not been on the front burner.

All of that said, what are the challenges now? The immediate challenges for national policy come in chronological order: President Bush's current proposal for a huge tax cut (which will most likely be enacted before these remarks are published), incremental changes in policies and programs that can be enacted on a bipartisan basis and reauthorization of

the 1996 welfare law, which will occur in 2002. The broader challenge is to create a movement of wider public support for fairness for lower-income people, to support better public policy at all levels and to participate more in civic efforts to improve outcomes for children and families and everyone who is less well off.

The problems with President Bush's tax cut are mammoth. It is so massive, even as slightly reduced by objections coming mainly from Democrats, that it will severely hamper the capacity of the federal government to contribute to meeting longstanding needs, like the still unfulfilled hope for national health coverage. Its design favors the wealthy so extensively that one might have thought it would elicit a widespread political backlash, but that has not occurred. The after-tax income of the wealthiest taxpayers rose by forty-seven percent during the boom of the 1990s, while the after-tax income of the remaining ninety-five percent rose by only eight percent. Yet the wealthy will receive disproportionate relief. The relief for people at the bottom is a pittance. The Earned Income Tax Credit illustrates that tax policy can be used constructively for antipoverty purposes. Making the current child tax credit of \$500 a child fully refundable – that is, payable to all families regardless of whether they owe federal income taxes – would lift a million children out of poverty. The idea has substantial support in Congress, but so far does not command a majority.

The tax cut will make finding money for increasing the federal investment in helping low-income people more difficult. Nonetheless, there is a feasible agenda for incremental action at the present time. Increased federal funding for child care, extending federally funded health coverage to low-income parents whose children are currently covered, putting more money toward the education of poor children and doing more about the excruciating crisis in affordable rental housing are all matters where there has been bipartisan support in recent years. How much progress is made on these fronts in the immediate future depends in part on the attitude of the Bush Administration and in part on the degree of support expressed by people around the country.

The third front for action in the current Congress is the reauthorization of the 1996 welfare law, which expires in 2002. Fundamental change in its framework is unlikely, but some improvements are possible.

The first fight will be over money. Some will argue that since the welfare rolls have been cut in half, the funds should be reduced, and the requirements for states to continue spending at least seventy-five percent of what they were previously spending should be eased. Antipoverty advocates will argue that the job is not finished until poverty is reduced, and that people recently employed will be in danger of being unable to hold on to those jobs without child care help and other supports. They will also point out that more funding is needed in a time of recession.

A second debate will be over marriage and fatherhood. Some conservatives will argue that the federal law needs to do more to push people into marriage. Liberals will argue that marriage and other stable relationships will be encouraged by helping fathers to get jobs and by changing current child support practices to assure that payments made by fathers actually inure to the benefit of their children instead of being kept by the state.

Advocates for the poor will pursue a number of other measures:

- Rewarding employment by creating exceptions to time limits for payments that supplement income from low-wage jobs;
- Exceptions to both time limits and work requirements for pursuit of postsecondary education, and during times of recession whether national or local;
- An increase in the percentage of the caseload (now twenty percent) permitted to receive federally supported assistance beyond five years;
- Rewards to encourage states to implement approaches that stress poverty reduction;
- Exemptions from requirements for full-time employment for people who have significant barriers to work, including the need to care for very young children;
- Incentives to encourage states to invest adequately in child care, health coverage, transportation, tailored job training,

literacy, mental health services, drug and alcohol treatment and other measures that help people get the best possible job and retain that job once they have it;

- Ending all restrictions on assistance to legal immigrants;
- Steps to assure that people get the food stamp and health coverage to which they are legally entitled; and
- Clearer support for responding to the needs of women who are victims of domestic violence.

The broader challenge is to change the political equation: to create a movement for economic justice. Without broader public involvement and support, progress will continue to be limited primarily to legislative steps that occur largely out of public view, advocated by a handful of outside experts and pushed inside by an equally small group of caring legislators. These will typically be incremental in nature and subject to backlash whenever conservatives decide it suits their political need to scapegoat the poor.

How does one create political momentum emanating from a broadened political base? There is of course no easy or surefire answer to the question, but the essential task is one of organizing. Deep recessions and wars create political change but at an unacceptable cost. Better national leadership helps, but it is limited in what it can accomplish without support from the electorate. So organizing is the answer. There are some good signs. The NAACP's voter registration drive this past year was remarkably effective. The labor movement shows signs of revitalization, with a particular interest in organizing low-income workers. People of faith on the progressive side are becoming more active, especially in ways that are oriented to affecting public policy. Young people are stirring, asking hard questions about globalization and sweatshop labor and demanding that universities pay all of their employees a living wage.

A movement is needed not only to affect national policy in the short run, but also to put on the table issues that are not addressed adequately in the current dialogue: the widening gaps between rich and poor, continuing issues of race and gender, a clear sense of the responsibility of each community for those who lack a fair share. The American people are

generous, volunteering in ways unheard of in other wealthy nations. Yet they often reflect a "disconnect," a failure to see the connection between the problem they are ameliorating and the issues of structure and policy that create the problem or fail to solve it on a larger scale. Why is this person homeless? Why is this child behind in school? Why do these people need a meal from a soup kitchen or food from a food pantry? Is it just a personal deficiency or is there a housing shortage, a question of educational quality, a question of economic structure?

Not everyone will be the activists and the organizers, but everyone can ask, what can I do? How can I be more effective? What organizations and communities do I belong to that are already active and could use my participation or could be activated? These are the challenges.

All of us need to take heed of the words of President Franklin D. Roosevelt in his second Inaugural Address, carved in stone at the FDR Memorial in Washington, D.C. He said, "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little."

Those words, perhaps more applicable than ever, should be our guide and our inspiration. Can we make progress? It really depends on us.

FULL-TIME WORKERS SHOULD NOT BE POOR: THE LIVING WAGE MOVEMENT

William Quigley*

I. INTRODUCTION

Los Angeles' prototypical poor person is no longer a scruffy panhandler on the freeway offramp, or a skid row derelict camped beneath a blue tarp. Today's poverty icon is a working mother, toiling eight hours or more a day at a job that does not pay enough to cover the rent, clothe the baby or provide a life of even minimal comfort.¹

If a person works full-time, she should not have to raise her family in poverty. Advocacy for enactment of a living wage is summed up in that simple statement.²

* Professor of Law, Loyola University New Orleans. The author dedicates this article to all of his co-workers at Haag's warehouse in 1964 and 1965. The author also notes that he has been counsel for the Association of Community Organizations for Reform Now (ACORN) efforts in New Orleans to put a proposal on the ballot to raise the minimum wage in the City of New Orleans to one dollar over the federal minimum wage.

¹ Jim Newton, *L.A.'s Growing Pay Gap Looms as Political Issue Poverty: Santa Monica Considers Minimum Wage Law and L.A. Mayoral Hopefuls Weigh in on Plight of Working Poor*, L.A. TIMES, Sept. 7, 1999, at A1, available at 1999 WL 26173256.

Every night, when the movers and shakers head out of the Central Business District's gleaming office towers, Iva White is just showing up. Her job: to clean, vacuum and dust the offices where some of New Orleans' biggest business gets done. Her reward: \$5.20 an hour, a nickel above the minimum wage, for 3 hours of work each night. Her paycheck, after deductions: about \$140 every two weeks.

Stephanie Grace, *Groups Wage War Over Pay in New Orleans*, NEW ORLEANS TIMES-PICAYUNE, Jan. 17, 2001, at 1, available at 2001 WL 9379321.

² Those interested in more about the living wage movement should consult, as I have, the following excellent resources: DAVID CARD & ALAN B. KREUGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); LAWRENCE B. GLICKMAN, A LIVING WAGE: AMERICAN WORKERS AND THE MAKING OF CONSUMER SOCIETY (1997); VIVIEN HART, BOUND BY OUR CONSTITUTION: WOM-

The direction of the living wage movement is evidenced by the October, 2000 enactment of the nation's highest living wage by the Santa Cruz City Council; the ordinance mandates that city employees and employees of city contractors be paid at least \$11 an hour if they receive health benefits, and \$12 an hour if they do not receive benefits.³ Living wage advocates in Santa Cruz were seeking \$27 an hour to allow families to survive the local high cost of living.⁴

The breadth of the movement is evidenced by the fact that as of early 2001, more than fifty jurisdictions had enacted living wage ordinances and another seventy-five or so had ongoing living wage campaigns.⁵

EN, WORKERS AND THE MINIMUM WAGE (1994); WILLIS J. NORDLUND, THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM (1997); ROBERT POLLIN & STEPHANIE LUCE, THE LIVING WAGE: BUILDING A FAIR ECONOMY (1998); JOHN A. RYAN, A LIVING WAGE (1906); JERALD WALTMAN, THE POLITICS OF THE MINIMUM WAGE (2000); Chauna Brocht, *The Forgotten Workplace: More Than One in 10 Federal Contract Workers Earn Less Than a Living Wage* (Economic Policy Institute, Briefing Paper No. 101, 2000), available at <http://www.epinet.org>; Seth Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LABOR & EMP. L.J. 19 (2000); Edith Rasell et al., *Step Up, not Out: The Case for Raising the Federal Minimum Wage for Workers in Every State*, (Economic Policy Institute, Issue Brief No. 149, 2001); J.M. Spectar, *Pay Me Fairly, Kathie Lee! The WTO, The Right to a Living Wage, and a Proposed Protocol*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 61 (2000).

Organizations providing information about living wage issues include:

- ACORN—an organization committed to supporting living wage ordinances. Their website is accessible at <http://www.livingwagecampaign.org> (last visited Mar. 1, 2001).
- American Federation of State, County and Municipal Workers (AFCSCME)—a union supporting living wage ordinances. The portion of their website devoted to living wage issues is accessible at <http://www.afscme.org/livingwage> (last visited Apr. 1, 2001).
- Economic Policies Institute—a think tank supportive of living wage ordinances. Their website is accessible at <http://www.epinet.org> (last visited Mar. 1, 2001).
- Employment Policies Institute—A research organization whose website is a comprehensive source for information opposed to the raising of the minimum wage or enacting living wage ordinances, accessible at <http://www.epionline.org> (last visited Mar. 2, 2001).

³ *Minimum Wage: Santa Cruz Adopts "Living Wage" Measure of \$12 Hourly for City and Contract Employees*, 208 DAILY LAB. REP. (BNA), at A-7 (Oct. 26, 2000) [hereinafter *Santa Cruz Minimum Wage*].

⁴ *Id.* Supporters argued that it costs \$27 an hour to live in Santa Cruz, which has become a commuter base for high tech workers, but asked for \$13 an hour with benefits and \$14 without benefits. *Id.*

⁵ *Id.* Santa Cruz joins fifty-five other cities and counties requiring contractors

The ongoing goal of the living wage movement is a broad effort of primarily local campaigns to try to fulfill the American goal stated so simply by President Franklin Delano Roosevelt in 1937:

"Our nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work."⁶

This article will describe the foundation of the living wage movement and its current presence, and will analyze its challenges.

II. THE CURRENT LIVING WAGE MOVEMENT

The current living wage movement is trying, primarily through local legislation, to bring justice to low wage workers by requiring that businesses which have public contracts pay their workers wages sufficient to support their families.⁷ The living wage movement is made up of a fabric local coalitions of community groups, labor organizations and interfaith religious denominations.⁸ The main argument of living wage supporters

that receive contracts of \$10,000 or more to pay a living wage to workers. Campaigns are under way in another seventy-five cities and counties to enact a living wage. See Carolyn Hirschman, *Paying Up*, HR MAGAZINE, July 2000, available at <http://www.shrm.org/hrmagazine/2000index/0700/default.asp?page=0700cov.htm>.

⁶ 144 CONG. REC. S10716-02 (daily ed. Sept. 22, 1998) (statement of Sen. Kerry) (quoting President Franklin D. Roosevelt).

As others have noted, the concept of a living wage predates President Roosevelt. For evidence of this, see the discussion of a 1913 Wisconsin statute directing the Wisconsin Industrial Commission to establish a living wage sufficient to enable employees to "maintain himself or herself under conditions consistent with his or her welfare." Spectar, *supra* note 2, at 62.

⁷ There are also efforts to expand and apply living wage contracts on the federal level and to broaden the coverage of living wages in local jurisdictions into businesses which do not receive public contracts. See *infra* pp. 977-78.

For a discussion of international efforts to create a living wage, see Spectar, *supra* note 2.

⁸ Hirschman, *supra* note 5. For case studies that illustrate the difficulties and promise of the growth of a coalition of labor, religious and community organizations, see Dorian T. Warren & Cathy J. Cohen, *Organizing at the Intersection of Labor and Civil Rights: A Case Study of New Haven*, 2 U. PA. J. LAB. & EMP. L. 629 (2000), which details the struggle for unionization of low wage workers at

is, as the Wall Street Journal aptly summarized: "Businesses which benefit from public largesse should pay their workers at least enough money to keep them out of poverty."⁹

The living wage movement is built on a recognition that the current federal minimum wage does not provide enough income for an individual to live on, much less an individual with a family. The current minimum wage is several dollars an hour short of a living wage and even several dollars short of matching its own value of thirty years ago.¹⁰ Living wage supporters seek to supersede the low federal minimum wage with a local requirement for a true living wage. Local living wage ordinances seek to implement living wages by one or more of a series of actions: requiring private contractors with local government contracts to pay all their employees a living wage; restricting local public aid to private corporations which pay their employees a living wage; or requiring all employers within the jurisdiction to pay a living wage.¹¹

Advocacy for living wages is not a new concept, but one that has been discussed for well over 100 years.¹² What is new is the growing energy in the living wage movement because of a series of local victories which resulted in the enactment of a

Yale. See also Penda D. Hair, *Prayer and Protest: Bringing a Community Vision of Justice to a Labor Dispute*, 2 U. PA. J. LAB. & EMP. L. 657 (2000); Nelson Johnson, *Reflections on an Attempt to Build 'Authentic Community' in the Greensboro Kmart Labor Struggle*, 2 U. PA. J. LAB. & EMP. L. 675 (2000) (portraying efforts of community to secure living wages for workers at K-Mart distribution center in Greensboro, North Carolina).

⁹ Peter Waldman, *Prosperity is Good for Living-Wage Drive*, WALL ST. J., Dec. 20, 1999, at A1, available at 1999 WL-WLJ 24926517.

¹⁰ At the time of the writing of this article, the federal minimum wage was \$5.15, an hourly wage put into effect September 1, 1997. See 29 U.S.C. § 206 (1994 & Supp. 1999). According to a 2001 report of the Congressional Research Service, the highest value of the minimum wage was reached in 1968. Had the rate been adjusted to allow it to retain its 1968 value, the present minimum would be about \$7.72 per hour. William G. Whittaker, *RL30690: Minimum Wage & Related Issues Before the Congress: A Status Report*, CONG. RES. SERV., Jan. 24, 2001, available at <http://www.cnire.org/NLE/CRSreport/Economics/econ-86.cfm>.

¹¹ See *infra* pp. 959 for further discussion on how local government living wage ordinances work.

¹² See *infra* pp. 935-50; see also Harris, *supra* note 2, at 39. Harris points to the existence of theorists and advocates for just wages dating back to 1750, and state and local efforts to enact living wages that reach back to the early 1900s. *Id.* at 39-69.

number of living wage ordinances. By early 2001 more than fifty jurisdictions had enacted living wage ordinances and another seventy-five were engaged in ongoing living wage campaigns.¹³

The first victory achieved by the current living wage movement came in the mid 1990s in Baltimore and emerged from action taken by a coalition of churches and labor organizations.¹⁴ A coalition of fifty churches approached the American Federation of State, County and Municipal Employees (AFSCME) to join in creating an organization of churches, labor union members and low-wage service workers. The churches were seeing an increase in the use of soup kitchens and pantries by workers and concluded that minimum wage jobs with no benefits were not helping people escape poverty. AFSCME members were concerned about the privatization of formerly government jobs in areas like janitorial and food services which replaced good public jobs with low wage private jobs. Together they concluded that private companies were paying low wages in order to win low-bid government contracts. Low-wage workers were often turning to food stamps, publicly financed health care and private assistance from churches to make up the difference from their low-wage work. The coalition viewed this as municipal subsidization of poverty. In response, the coalition created a local campaign for a law that would require businesses which had contracts with the city to pay their workers at least a living wage. Both the churches and labor unions contributed people and funds to create a working coalition to educate the public about the problem of low wages and to lobby for the living wage bill. The city ultimately enacted the local living wage law and it went into effect in July of 1996. The law required city contractors to pay a minimum of \$6.10 an hour in

¹³ *Santa Cruz Minimum Wage*, *supra* note 3, at A7. Santa Cruz joins fifty-five other cities and counties requiring contractors that receive contracts of \$10,000 or more to pay a living wage to workers. Campaigns are under way in another seventy-five cities and counties to enact a living wage. See also Hirschman, *supra* note 5.

¹⁴ Michelle Amber, *Low-Wage Workers: AFSCME, Church Group Sponsor Workers' Organization in Baltimore*, 1 DAILY LAB. REP. (BNA), at D20 (Jan. 3, 1995).

1996, rising in annual increments to \$7.70 an hour in 1999. The goal of the law is to place the wage at a level sufficient to lift a family of four over the poverty level. The law was estimated to apply to between 2000 and 3000 workers.¹⁵

The success of the Baltimore effort inspired the development of other living wage coalitions made up of labor, community, and religious organizations.

Labor organizations have been pushing living wage ordinances in order to show their commitment to low-wage workers.¹⁶ They have also followed the lead of labor leaders in Baltimore by working to prevent privatization efforts from replacing well-paying city jobs with low-paying private jobs.¹⁷ Labor organizations have also re-invigorated their efforts to work in coalitions with religious and community groups.¹⁸

Community groups organize around living wage campaigns because of a combination of energies from national and local groups and a continuing national resource effort by the organizations of the AFL-CIO, ACORN and the New Party.¹⁹

Religious organizations and groups have become active in this movement because their faith compels them to speak up about issues of justice and poverty. Religious advocacy for just wages and living wages have been articulated by religious groups for more than 100 years.²⁰ Many religious groups have

¹⁵ *Id.*; see *Baltimore Mayor Signs 'Living Wage' Bill*, 238 DAILY LAB. REP. (BNA), at D21 (Dec. 14, 1994).

¹⁶ See Amber, *supra* note 14.

¹⁷ EMPLOYMENT POLICIES INSTITUTE, LIVING WAGES POLICY: THE BASICS 7 (2000).

¹⁸ John Sweeney, *Building A Labor Movement Strategy for the New Century*, 7 GEO. J. ON POVERTY L. & POL'Y 163, 165-66 (2000).

¹⁹ POLLIN & LUCE, *supra* note 2, at 8. For example, ACORN has worked on numerous local living wage campaigns with the AFL-CIO and is active in the federal living wage campaign. Fawn M. Johnson, *Minimum Wage: Nonprofit to Launch National Campaign to Push for Federal Living Wage Legislation*, 230 DAILY LAB. REP. (BNA), at A-9 (Nov. 29, 2000); see also Amanda Crawford, *Living Wage Campaigns Gain Momentum: Local Debates in Several States*, 187 DAILY LAB. REP. (BNA), at S-21 (Sept. 26, 1977).

²⁰ For contemporary advocacy, see Katia Hetter, *Labor Has Ally in the Pulpits*, NEWSDAY, Dec. 12, 2000, at A66, describing sixty local groups of Interfaith Coalition for Worker Justice which work to bring concerned religious people and organizations together with progressive labor leaders, available at 2000 WL 10048422. See also National Interfaith Committee for Worker Justice, at

gone on record to support the right of workers to living wages, including: the Catholic Church;²¹ the Episcopal Church;²² the Jewish Council for Public Affairs;²³ the Unitarian Universalist Association;²⁴ and the United Methodist Church.²⁵

The living wage movement is also buoyed by broad public support. An April, 2000 survey found that 94% of the one thousand adults questioned agreed with the statement that "as a country, we should make sure that people who work full-time should be able to earn enough to keep their families out of poverty."²⁶ There also has been consistent public backing for

<http://www.nicwj.org> (last visited Apr. 1, 2001); Amber, *supra* note 14. See *infra* pp. 938-40 on religious support for living wage; see also Harris, *supra* note 2, at 39-46 (outlining efforts of religious leaders in creation of minimum wage laws).

A prominent Catholic priest, John Ryan, wrote in the early 1900s that "[t]he wage earner's right to a decent livelihood in the abstract means in the concrete the right to a living wage." RYAN, *supra* note 2, at 116.

"A living wage is the minimum of justice, not the full measure of justice," recently observed one moral theologian. Patricia Ann Lamoureux, *Is a Living Wage a Just Wage?*, AMERICA, Feb. 19, 2001, at 184, available at 2001 WL 8952491.

²¹ For a longer discussion of Catholic support for a living wage see *infra* pp. 938-40. The Catholic church has a long history of advocating that ethics and justice require working people be given both a right to work and a right to receive a living wage for their work. David L. Gregory, *Catholic Social Teaching On Work*, 49 LAB. L.J. 912, 912-19 (1998); see also David L. Gregory, *Breaking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1, 30-35 (1997).

²² See EPISCOPAL PUBLIC POLICY NETWORK, 1997 LIVING WAGE RESOLUTION (1997), available at <http://ecusa.anglican.org.eppn/display.asp>, calling for a living wage set at the poverty threshold for a family of four, or, in 1997 dollars, \$7.50 an hour plus benefits.

²³ JEWISH COUNCIL FOR PUBLIC AFFAIRS, RESOLUTION ON MINIMUM WAGE (adopted Feb. 23, 1998), available at <http://www.jewishpublicaffairs.org/resolutions/main.html> (last visited Mar. 1, 2001).

²⁴ See UNITARIAN UNIVERSALIST ASSOCIATION, WORKING FOR A JUST ECONOMIC COMMUNITY (1997) (calling for "[a] true single minimum wage, applicable to all workers, that provides an adequate standard of living"), available at <http://uuaa.org/actions/economic-justice/97community.html>; UNITARIAN UNIVERSALIST ASS'N, 2000 STATEMENT OF CONSCIENCE, ECONOMIC INJUSTICE, POVERTY, AND RACISM: WE CAN MAKE A DIFFERENCE (2000) ("Our work for economic justice must include support for [1] fair wages and benefits . . ."), available at <http://www.uuaa.org/action/economic-justice/00difference.html>.

²⁵ THE UNITED METHODIST CHURCH, GENERAL CONFERENCE 2000, RESOLUTION 102 (2000), available at <http://www.gc2000.org>.

²⁶ Linda Roeder, *Minimum Wage: Survey Shows Support for Living Wage, Economists Say at Washington Summit*, 102 DAILY LAB. REP. (BNA), at A-9 (May

raising the minimum wage.²⁷ Other polls continue to show overwhelming support for modest raises in the minimum wage.²⁸ Conservative Pat Buchanan received wide support for his call for "a standard of living that rises each year, and a 'family wage' that enables a single parent to feed, clothe, house, and educate a large family in decency."²⁹ Students and faculty in universities are now advocating for their institutions to pay

25, 2000). The survey referred to by Roeder was prepared in connection with a conference sponsored by Jobs for the Future, entitled *Low Wage Workers in the New Economy: Strategies for Productivity and Opportunity*. See <http://www.jff.org/programs/cluster3/projects/careeradvstrat.html> (last visited Apr. 1, 2001). The survey was conducted for Jobs for the Future which generally supports living wage ordinances. Copies of the survey results are available with the program conference materials on the website for Jobs for the Future at <http://www.jff.org>.

²⁷ See WALTMAN, *supra* note 2, at 48-68. When the minimum wage was first introduced in the 1930s, Americans backed it by a three to two margin. In the decades since that time there has been "heavy public backing for increasing the minimum wage" according to Gallup polls. George Gallup, Jr., *Support for Higher Minimum Wage*, S.F. CHRON., May 28, 1987, at 24, available at 1987 WL 4035331.

Opinion polls taken over the last ten years have consistently shown overwhelming support for raising the minimum wage, among both Democrats and Republicans. A 1987 Gallup poll showed 77% in favor of raising the minimum wage. *Id.* In 1988, Gallup reported 76% approval, including 85% of Democrats, 67% of Republicans and 74% of independents, for a raise in the minimum wage. George Gallup, Jr., *76% Favor Raising Minimum Wage*, S.F. CHRON., June 20, 1988, at A11, available at 1988 WL 6130316. In 1989, a *Washington Post/ABC* poll found 84% backing an increase in the minimum wage. *Senate Wage Bill Ignores Bush Veto Threat*, S.F. CHRON., Apr. 7, 1989, at A16, available at 1989 WL 7174900. In a 1995 poll by the *Los Angeles Times*, 72% of Americans, including 62% of Republicans, backed an increase in the minimum wage. Robert Shogan & Doyle McManus, *As Campaign Gears Up Clinton is Determined to Beat Reelection Odds*, L.A. TIMES, May 15, 1995, at 4, available at 1995 WL 2046496. Other 1995 polls, including those taken by *USA Today* and the *Times-Mirror* found 77% to 80% in favor. See Richard Benedetto, *Clinton Gets a Bump, Gingrich Slides in Poll*, USA TODAY, Feb. 7, 1995, at 4A (showing 77% back raise in minimum wage), available at 1995 WL 2920319; Jill Lawrence, *Polls Suggest Americans Know Little About Policy Issues*, FORT WORTH STAR-TELEGRAM, Feb. 26, 1995, at 2AA (*Times-Mirror* poll found eight of ten people support minimum wage raise); James Ledbetter, *Press Clips: Erasing the Poor*, VILLAGE VOICE, Feb. 14, 1995, at 8 (NBC News poll found 78% favor, 18% oppose raise in minimum wage), available at 1995 WL 1028590.

²⁸ See, e.g., *Poll: Mainers Support Minimum Wage Hike*, BANGOR DAILY NEWS, May 7, 1998 (81% of Maine citizens support modest raise in minimum wage), available at 1998 WL 3124576.

²⁹ PAT BUCHANAN, *THE GREAT BETRAYAL* 289 (1998).

all their workers at least living wages.³⁰

Recent state and local governmental actions indicate the living wage movement is picking up substantial public support there as well. Voters in Detroit in November of 1998 passed a living wage ordinance by a four to one margin with support from 80% of the voters.³¹ The ordinance required contractors doing more than \$50,000 a year in business with the city, or that received that amount in tax breaks, to pay their workers a minimum of \$7.70 an hour if they provide health insurance and \$9.63 an hour if no health insurance is provided.³² A spokesperson for the Detroit Chamber of Commerce said after the

³⁰ Students and faculty at Johns Hopkins staged a demonstration, demanding that their university pay its workers at least the \$7.90 an hour that the City of Baltimore was paying its workers. Mike Bowler, *Hopkins Protesters Encamp for Living Wage: Demonstrators Urge Minimum Hourly Rate of \$7.90 at Institution*, BALT. SUN, Mar. 9, 2000, at 1B, available at 2000 WL 4860297.

Students at the University of Virginia have lobbied their institution, in part by wearing buttons illustrated with the symbol "\$8," to encourage the university to pay its workers at least \$8 an hour in connection with living wage campaigns in Richmond and Alexandria, Virginia. Jeremy Redmon, *Push for 'Living Wage' Grows: Activists Say Many Struggling with Low Pay*, RICHMOND TIMES-DISPATCH, Jan. 31, 2000, at A1, available at 2000 WL 5028831.

In 1997, students and a Jesuit professor at Fairfield University organized the Concerned University Community Members to press for changes in the pay and treatment of contractual custodial workers. In early 2000, all custodial workers were guaranteed a minimum pay of \$8 an hour and the university agreed not to challenge union organizing efforts. *Minimum Wage Does Not Equal A Living Wage*, in ALL THINGS 20 (March 2000).

Harvard students and faculty continue efforts to press for a \$10.25 an hour living wage for all employees of the institution. See Daniela J. Lamas, *Living Wage Protestors Give Rudenstine a Valentine*, HARV. CRIMSON, Feb. 15, 2001 (including living wage valentines made by students for Harvard president, like one that read, "My Valentine Lives Below the Poverty Level."), available at www.thecrimson.com/article.aspx?ref=103220; Rick Valliere, *Harvard Rejects Proposed Living Wage of \$10 Per Hour for All University Workers*, 88 DAILY LAB. REP. (BNA), at A-2 (May 5, 2000).

Students at Wesleyan University took over an administration building in the Spring of 2000 to demand the university pay a living wage to all workers on campus, including those employed by subcontractors. *Apparel: Student Groups Hold National Student-Labor Day of Action*, 66 DAILY LAB. REP. (BNA), at A-5 (Apr. 5, 2000).

³¹ Charles Hurt, *"Living Wage" Foes Make Plans*, DET. NEWS, Nov. 5, 1998, at D1.

³² *Id.*

vote: "We knew there was no way we could stop it."³³ Also in the fall of 1998, voters in the state of Washington, by a two to one margin, raised their state minimum wage to \$5.70 an hour in 1999, to \$6.50 an hour in 2000 and voted to raise it in future years to keep pace with inflation.³⁴ In June of 2000, the city council of Alexandria, Virginia, unanimously passed a living wage ordinance which requires city contractors to pay \$9.84 per hour and health insurance benefits to employees on city contracts.³⁵ An effort is underway in the state legislature to preempt the law.

In August of 2000, by more than three to one, voters in St. Louis approved a living wage ordinance setting hourly rates at \$8.67 an hour for workers with health benefits and \$9.92 an hour for those without.³⁶ And, as noted above, the nation's highest living wage ordinance was passed by the Santa Cruz City Council in October of 2000; the law mandates that city employees and employees of city contractors be paid at least \$11 an hour if they receive health benefits and \$12 an hour if no benefits are provided.³⁷

Fifty jurisdictions did not spontaneously enact fifty living wage ordinances. The seventy-five additional living wage campaigns did not appear out of nowhere. These represent a culmination of great organizing and decades of advocacy work.

³³ *Id.*

³⁴ Votes were 67% in favor and 33% against the increase. See *News: King County*, SEATTLE POST-INTELLIGENCER NEWS, Nov. 16, 1998, at B2, available at 1998 WL 22734328. While many states have set higher minimum wages than the federal level, Washington is the first state to annually raise the minimum wage based on the rate of inflation.

³⁵ *Minimum Wage: City in Alexandria Virginia Approves New Living Wage Ordinance for City Contractors*, 119 DAILY LAB. REP. (BNA), at A-6 (June 20, 2000).

³⁶ Frederick Kunkle & Craig Thomas, *Alexandria Officials Aim to Defend Living Wage*, WASH. POST, Feb. 1, 2001, at A1, available at 2001 WL 2541077. St. Louis voters, in an initiative pushed by ACORN, approved a living wage ordinance 26,311 to 7794 on August 8, 2000. The law sets hourly wages for city contractors and companies that receive city tax breaks, grant money or other forms of aid at \$8.67 an hour with benefits or \$9.92 without. The hourly rate is set at 130% of federal poverty guidelines for a family of three. Kip Betz, *Minimum Wage: St. Louis Voters Approve 'Living Wage' Requirement for City Contract Workers*, 156 DAILY LAB. REP. (BNA), at A3 (Aug. 11, 2000).

³⁷ See *Santa Cruz Minimum Wage*, *supra* note 3.

This article will now review the historical foundation for the living wage movement.

III. HISTORY OF SUPPORT FOR LIVING WAGE

Governments have been regulating wages for quite some time. A brief look at prior wage legislation will place current efforts for living wages in an appropriate historical context.

A. England

Over six centuries ago, governmental edict set maximum wages for the working poor. In the very first English statute where government addressed the situation of poor people, the Statute of Labourers of 1351, the laws empowered local justices of the peace to set maximum wages.³⁸ The Statute of Labourers rolled back maximum wages for workers to pre-Black Death levels (e.g., mowers of meadows were paid 5d a day, carpenters 2d a day, etc.) and imposed criminal penalties on workers and employers who violated the law.³⁹ Therefore, "the precedent of government involvement in labor standards regulation dates at least six centuries."⁴⁰

The first living wage was set in England after Parliament authorized local justices of the peace to determine wages.⁴¹

³⁸ Statute of Labourers, 1351, 25 Edw. 3, chs. 1-7 (Eng.). Workers were at a premium because of the devastation of the Black Death (1348-1349) which killed almost one-third of England's population. Those workers who survived were demanding higher wages because of the shortage of help. See Ralph A. Griffiths, *The Later Middle Ages*, in *THE OXFORD HISTORY OF BRITAIN* 192, 214 (Kenneth O. Bagnall ed., 1991) (summarizing plague's effects). The statute was proposed by a royal ordinance with the same purpose issued shortly after the plague struck England. See 23 Edw. 3 (1349) (Eng.); ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-81: A TRANSFORMATION OF GOVERNANCE AND LAW* (1993) (describing ordinance of labourers).

³⁹ 25 Edw. 3, at chs. 1-3. See generally Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 716 (1988); William Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 82-92 (1996).

⁴⁰ Nordlund, *supra* note 39, at 716.

⁴¹ See Statute of Artificers, 5 Eliz., ch. 4 (1562) (Eng.). This statute expressed concern for the wages of the poor but empowered the justices of the peace "to limit, rate, and appoint" wages and was really a piece of repressive legislation. A subsequent law, 1 Jam., ch. 6 (1604) (Eng.), was a more liberal attempt at mini-

From 1795 to 1834, the justices of the peace in Speenhamland, Berkshire, set the wages of workers to the price of bread and the number of people in the worker's family; whenever the price of wheat rose, wages rose, and if wages did not, local authorities supplemented the wage.⁴²

Efforts to provide living wages for workers began with a focus on requiring employers to pay at least a minimum wage to workers, usually women workers. In many ways the history of minimum wage legislation was the history of the rights of women workers who were the lowest paid and had the least legal protection of all of the working poor.⁴³ Modern minimum wage regulations were first developed in New Zealand and Australia around the turn of the century; the British Parliament followed in 1909.⁴⁴ The New Zealand Industrial Conciliation and Arbitration Act of 1894 gave the Court of Arbitration power to address labor disputes in industry by setting binding minimum wages for all workers in a given district. In 1896, the Australian state of Victoria established a system of wage boards and most all states followed.⁴⁵ The British Parliament followed and adopted minimum wage legislation in 1909 aimed at abolishing "sweating."⁴⁶

The current living wage movement should note that Parliament was severely criticized by business interests for interfering in commerce when they tried to establish fair wages. The government, however, was unpersuaded by the criticisms that businesses might close if they had to pay a decent wage. A 1908 committee of Parliament studying low-wage employment

mentum wage legislation. See KARL DE SCHWEINITZ, *ENGLAND'S ROAD TO SOCIAL SECURITY* 79 (1943); see also SAMUEL MENCHER, *POOR LAW TO POVERTY PROGRAM: ECONOMIC SECURITY POLICY IN BRITAIN AND THE UNITED STATES* 34-35 (1967).

⁴² SCHWEINITZ, *supra* note 40, at 72-78; Quigley, *supra* note 39, at 113-17. The plan "guidely spread throughout England." SCHWEINITZ, *supra* note 40, at 73.

⁴³ See HART, *supra* note 2, at 12 ("[T]he development of minimum wage policy has been primarily the development of a policy for women workers"); *id.* at 6-20 (describing conditions of women piecemeal workers).

⁴⁴ GERALD STARR, *MINIMUM WAGE FIXING* 1 (1981) (tracing origins of minimum wage). See HART, *supra* note 2, for a very good history of the efforts for minimum wages in England and the United States.

⁴⁵ STARR, *supra* note 43, at 1. Only Western Australia lagged behind. *Id.*

⁴⁶ *Id.* "Sweating" referred to the exploitive employment of piecemeal workers. HART, *supra* note 2, at 16.

concluded:

It is doubtful whether there is any more important condition of individual and general well-being than the possibility of obtaining an income sufficient to enable those who earn it to secure, at any rate, the necessities of life. If a trade will not yield such an income to average industrious workers engaged in it, it is a parasite industry, and it is contrary to the general well-being that it should continue.⁴⁷

B. United States

While wage legislation did not come to the United States until early in the twentieth century, the demand for more than subsistence wages started in earnest after the Civil War.⁴⁸ The first real push for a governmental right to a living wage was in the efforts of individual states to create minimum wage protections.⁴⁹ From the very beginning, the push for a living wage and the push for a minimum wage were related. Those advocating minimum wage laws often used the idea of the provision of a living wage as a goal of employment.

Like the efforts in other countries, the United States campaign for minimum wage laws to protect workers was the result of growing public concern about the prevalence of sweatshops, primarily victimizing recent immigrants, women and the young.⁵⁰

Many employers that paid very low wages were in the garment industry, retail stores and canning and cigar-making factories.⁵¹ As in other countries, advocacy groups pushing for

⁴⁷ HART, *supra* note 2, at 23.

⁴⁸ GLICKMAN, *supra* note 2, at 65-71. The use of the term "living wage" in these debates dates from the 1870s. *Id.*

⁴⁹ William P. Quigley, *A Fair Day's Pay for a Fair Day's Work: Time to Raise and Index the Minimum Wage*, 27 ST. MARY'S L.J. 513, 516-19 (2000); see also Harris, *supra* note 2, at 39-69 (pointing to the existence of theorists and advocates for just wages dating back to 1750, and state and local efforts to enact living wages reaching back to the early 1900s).

⁵⁰ HART, *supra* note 2, at 64. These are the exact same groups still subject to sweatshop conditions in the United States. See Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179, 2182 (1994).

⁵¹ HART, *supra* note 2, at 64. While unionized manufacturing workers earned

minimum wages were primarily women's groups like the Women's Educational and Industrial Union (WEIU), the Women's Trade Union League (WTUL) and the Consumers' League, with some labor union support.⁵² Details of the hazardous working conditions in which women and children nationwide were forced to work were compiled by the Federal Bureau of Labor and were released in a nineteen-volume report in 1910 and 1911 compiled.⁵³

C. *The Living Wage as a Separate Movement*

The campaign for a living wage, as opposed to a minimum wage, started with the labor movement both in the United States and in England in the late 1800s.⁵⁴

Outside the labor movement, religious reformers were the first group to call for a living wage, starting with Pope Leo XIII's 1891 papal letter to the Catholic bishops of the world, *On the Condition of Labor*, which recognized the right of every worker to receive wages sufficient to provide for a family.⁵⁵ Since then, the Catholic Church has repeatedly spoken out for

just over \$20 for a fifty-hour week, and non-unionized manufacturing workers earned just under \$15 for a fifty-hour week, women in the garment industry earned \$6 per week. *Id.* at 65-66.

⁵² *Id.* at 67-68. The WTUL emerged as the leader in the Massachusetts campaign, first pressing for minimum wage legislation in 1909. They were joined by a coalition of labor groups, including the powerful textile workers. *Id.*

⁵³ See Nordlund, *supra* note 39, at 716.

⁵⁴ See GLICKMAN, *supra* note 47, at 62-77.

⁵⁵ See *id.* at 134-35. Pope Leo XIII insisted that employers and workers had to be allowed the freedom to enter into wage agreements:

[T]here is always underlying such agreements an element of natural justice, and one greater and more ancient than the free consent of contracting parties, namely, that the wage shall not be less than enough to support a worker who is thrifty and upright. If, compelled by necessity or moved by fear of a worse evil, a worker accepts a harder condition, which although against his will he must accept because an employer or contractor imposes it, he certainly submits to force, against which justice cries out in protest.

...

If a worker receives a wage sufficiently large to enable him to provide comfortably for himself, his wife and his children, he will, if prudent, gladly strive to practice thrift

LEO XIII, RERUM NOVARUM [ON THE CONDITION OF THE WORKING CLASSES] paras. 63, 65 (1891).

the rights of workers to living wages to support their families.⁵⁶

⁵⁶ In 1931, on the fortieth anniversary of Pope Leo's letter, Pope Pius XI reaffirmed the principle of the need for a living wage, saying "[i]n the first place, the worker must be paid a wage sufficient to support him and his family." PIUS XI, QUADRAGESIMO ANNO [ON RECONSTRUCTION OF THE SOCIAL ORDER] para. 71 (1931).

In 1940, archbishops and bishops of the administrative board of the National Catholic Welfare Council spelled out the need for a living wage and exactly how comprehensive a living wage actually is:

The first claim of labor, which takes priority over any claim of the owners to profits, respects the right to a living wage. By the term "living wage" we understand a wage sufficient not merely for the decent support of the workingman himself but also of his family. A wage so low that it must be supplemented by the wage of wife and mother or by the children of the family before it can provide adequate food, clothing, and shelter together with essential spiritual and cultural needs cannot be regarded as a living wage.

Furthermore, a living wage means sufficient income to meet not merely the present necessities of life but those of unemployment, sickness, death, and old age as well.

NATIONAL CATHOLIC WELFARE COUNCIL, STATEMENT ON THE CHURCH AND SOCIAL ORDER paras. 40-41, *quoted in* 86 CONG. REC. app. at 861-62 (1940).

In 1961, responding to those who said wages should be left to the dictates of the market, Pope John XXIII proclaimed:

[T]he remuneration of work is not something that can be left to the laws of the marketplace; nor should it be a decision left to the will of the more powerful. It must be determined in accordance with justice and equity; which means that workers must be paid a wage which allows them to live a truly human life and to fulfill their family obligations in a worthy manner.

JOHN XXIII, MATER ET MAGISTRA [ON CHRISTIANITY AND SOCIAL PROGRESS] para. 71 (1961).

In 1963, he challenged governments to implement the right to work for a living wage: "The government should make . . . effective efforts to see that those who are able to work can find employment in keeping with their aptitudes, and that each worker receives a wage in keeping with the laws of justice and equity." JOHN XXIII, PACEM IN TERRIS [PEACE ON EARTH] para. 64 (1963).

Together with a worldwide assembly of Catholic bishops, Pope Paul VI in 1965 challenged world governments to ensure that "payment for labor . . . be such as to furnish a man with the means to cultivate his own material, social, cultural, and spiritual life worthily, and that of his dependents." SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD [GAUDIUM ET SPES] para. 67, *in* THE DOCUMENTS OF VATICAN II, at 276 (Walter M. Abbott ed., 1966) (1965).

In 1981, Pope John Paul II indicated that payment of living wages was a major criterion for determining the legitimacy of the entire economic system:

In every system, regardless of the fundamental relationships within it be-

Protestant churches have called for the establishment of living wages since 1908.⁵⁷ On the local level, in 1911, the Mil-

tween capital and labor, wages, that is to say *remuneration for work*, are still a *practical means* whereby the vast majority of people can have access to those goods which are intended for common use: both the goods of nature and manufactured goods. Both kinds of goods become accessible to the worker through the wage which he receives as remuneration for his work. Hence, in every case, a just wage is the concrete means of *verifying the justice* of the whole socioeconomic system and, in any case, of checking that it is functioning justly. It is not the only means of checking, but it is a particularly important one and, in a sense, the key means.

JOHN PAUL II, LABOREM EXERCENS [ON HUMAN WORK] para. 89 (1981) (explaining living wage).

In 1986, the Catholic Bishops of the United States, in a letter entitled *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, placed economic inequality squarely on the social justice agenda for the American economy. In their letter, the bishops pointed to the primacy of employment at just wages: "The first line of attack against poverty must be to build and sustain a healthy economy that provides employment opportunities at just wages for all adults who are able to work." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY para. 196 (1986), *quoted in* 133 CONG. REC. 3842 (1987).

Again in 1991, John Paul II pointed out that guaranteeing a living wage to the working poor is part of the responsibility of government:

The richer class has many ways of shielding itself, and stands less in need of help from the state; whereas the mass of the poor have no resources of their own to fall back on, and must chiefly depend on the assistance of the state. It is for this reason that wage-earners, since they mostly belong to the latter class, should be specially cared for and protected by the Government.

JOHN PAUL II, CENTESIMUS ANNUS para. 10, *in* THE ENCYCLICALS OF JOHN PAUL II, 587, 598 (1991) (quoting LEO XIII, *supra* note 54, at para. 37). John Paul II also reaffirmed that "[a] workman's wages should be sufficient to enable him to support himself, his wife and his children." *Id.* at para. 8.

Refusing to pay just wages, even if allowed to do so by law, is a violation of the seventh commandment according to the 1992 *Catechism of the Catholic Church*:

Even if it does not contradict the provisions of civil law, any form of unjustly taking or keeping the property of others is against the seventh commandment: thus, deliberate retention of goods lent or objects lost; business fraud; paying unjust wages; forcing up prices by taking advantage of the ignorance or hardship of another.

CATECHISM OF THE CATHOLIC CHURCH para. 2409 (1992); *see id.* at para. 2434 (defining just wage in terms of SECOND VATICAN COUNCIL, *supra*).

⁵⁷ See Don D. Lescohier, *Working Conditions*, in 3 HISTORY OF LABOR IN THE UNITED STATES 1896-1932, at 63 (1935) [hereinafter HISTORY OF LABOR], outlining the history of Protestant churches' living and just wage efforts.

waukee Federation of Churches joined with local community organizations such as the Consumers' League to push for the first minimum wage bill in the United States.⁵⁸ In 1919, the Federal Council of Churches of Christ in America proclaimed that "[t]he living wage should be the first charge upon industry, before dividends are considered."⁵⁹

D. Twentieth Century Acceptance of Living and Minimum Wages

By the early 1900s, living wages and minimum wage protections for women and children were beginning to enjoy political support. In his December, 1919 message to Congress, President Wilson proclaimed that workers needed wages sufficient to live in comfort, unhampered by fear of poverty and want in old age.⁶⁰

The first state minimum wage law in the United States was enacted in 1912 by Massachusetts and patterned on the British Trade Boards Act of 1909.⁶¹ This law, which covered only minors and women, was not compulsory and the authorities could only recommended minimum wage rates that would provide a living wage.⁶² By 1938, the year the Fair Labor Standards Act (FLSA)⁶³ was passed, many states had some

⁵⁸ Elizabeth Brandeis, *Minimum Wage Legislation*, in HISTORY OF LABOR, *supra* note 57, at 513.

⁵⁹ JOHN A. RYAN, *ECONOMIC JUSTICE: SELECTIONS FROM DISTRIBUTIVE JUSTICE AND A LIVING WAGE* 124 (Harlan R. Beckley ed., 1996).

⁶⁰ GEORGE E. PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS, 1933-1941*, at 22 (1996). In 1912, former President Theodore Roosevelt, as candidate for the Progressive party, endorsed minimum wage laws and President Woodrow Wilson condemned employers who objected to paying minimum wages, saying they denied the bread of life to the needy. *Id.* at 42.

⁶¹ HART, *supra* note 2, at 14-62. A brief history of the Massachusetts campaign to enact the minimum wage law can be found in HART, *supra* note 2, at 66-72.

⁶² See Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 545 (1924) ("[Massachusetts] employers are exposed to public knowledge of the wages paid and are thereby subjected to public censure or public praise. Sentiments of decency or vanity may move the niggardly to mend their ways, but the recalcitrant are left free to bargain as they can and will."); see also Nordlund, *supra* note 39, at 716.

⁶³ 29 U.S.C. §§ 201-219 (1994 & Supp. V 1999).

form of a minimum wage law.⁶⁴ Several of these state minimum wage laws specifically tried to set their state minimum wage to the "necessary cost of living."⁶⁵

On the federal level, Congress enacted a minimum wage law in 1918 which created a Minimum Wage Board for the District of Columbia with the power to determine and enforce minimum wages for women and minors working in the District.⁶⁶ The D.C. Minimum Wage Board set a minimum wage for women hotel employees of thirty-four and a half cents per hour.⁶⁷

Then the United States Supreme Court changed everything. The federal minimum wage law was declared invalid by the Court in 1923 in *Adkins v. Children's Hospital*, despite an earlier decision of the Supreme Court which allowed the Oregon minimum wage law to stand.⁶⁸ The 1923 decision found that the law unconstitutionally interfered with freedom to contract and imposed on employers the burden of supporting a "partially indigent person."⁶⁹ The effect was devastating. One

⁶⁴ Keith B. Leffler, *Minimum Wages, Welfare, and Wealth Transfer to the Poor*, 21 J.L. & ECON. 345, 346 (1978). Twenty-five states had in effect some form of minimum wage regulation at the effective date of the FLSA: Arizona, Arkansas, California, Colorado, Connecticut, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Washington and Wisconsin. Comment, *The Federal Wages and Hours Act*, 52 HARV. L. REV. 646, 673 n.203 (1939) (citing 2 WAGE & HOUR REP. 17-21 (Jan. 9, 1939)).

⁶⁵ Brandeis, *supra* note 57, at 523.

⁶⁶ Act of Sept. 19, 1918, ch. 174, 40 Stat. 960 (overturned by *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923)).

⁶⁷ *Children's Hosp. v. Adkins*, 284 F. 613, 615 (D.C. Cir. 1922).

⁶⁸ *Adkins*, 261 U.S. at 525. The Court had upheld a decision of the Oregon Supreme Court that the Oregon minimum wage law was constitutional in *Stettler v. O'Hara*, 243 U.S. 629 (1917).

⁶⁹ *Adkins*, 261 U.S. at 558. In the decision Justice Sutherland praised the idea of a living wage while declaring the law unconstitutional:

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity, is that it extracts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the services rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence,

commentator at the time said the decision "makes forever impossible all other legislation along similar lines involving the regulation of wages."⁷⁰ In 1936, the Supreme Court declared the New York state minimum wage law unconstitutional as well.⁷¹ Congressman Hamilton Fish called the latest Supreme Court action "a new Dred Scott decision condemning millions of Americans to economic slavery."⁷²

Despite the hostility of the Supreme Court to statutory wage protection for workers, President Roosevelt continued to propose federal legislation for decent wages, saying in 1937: "Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work."⁷³

On May 24, 1937, Senator Hugo Black of Alabama, with Roosevelt's backing, introduced the Fair Labor Standards Act, but it failed to be enacted that year.⁷⁴ Legislative history for the original FLSA can be found in several sources, both contemporary and modern.⁷⁵

The attempt to create a federal minimum wage was vigor-

health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it.

Id.

⁷⁰ WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 165 (1995).

⁷¹ *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). In a five-to-four decision, the Court affirmed *Adkins* and overturned the New York minimum wage law for women and children as repugnant to the Due Process Clause of the Fourteenth Amendment. *Morehead*, 298 U.S. at 618.

⁷² 80 CONG. REC. 9040 (1936) (statement of Senator Benson).

⁷³ 81 CONG. REC. 4960 (1937) (statement of President Franklin D. Roosevelt).

⁷⁴ S. 2475, 75th Cong. (1938).

⁷⁵ See, e.g., JAMES MACGREGOR, *CONGRESS ON TRIAL* 68-82 (1940) (best political analysis of enactment); NORDLUND, *supra* note 2, at 58; PAULSEN, *supra* note 59, at 68-155; John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 15 LAW & CONTEMP. PROBS. 464 (1939) (providing detailed contemporary analysis of how FLSA was enacted); Harris, *supra* note 2, at 19; Nordlund, *supra* note 39, at 715;

ously opposed by representatives of national business lobbies and interests from the low-wage South.⁷⁶ Organized labor generally favored the bill but had major reservations, as it feared that Congress would end up setting maximum wage rates.⁷⁷

E. The Fair Labor Standards Act

Life was given back to the efforts for a minimum wage by the unlikeliest of all parties—the United States Supreme Court.⁷⁸ In 1937, only months after finding the New York minimum wage unconstitutional, the United States Supreme Court reversed its previous decisions and ruled on behalf of a Washington chambermaid named Elsie Parrish in a matter decided as *West Coast Hotel Co. v. Parrish*.⁷⁹ Ms. Parrish, who worked as a chambermaid for the Cascadian Hotel in Wenatchee, Washington, sued her ex-employer for back pay of \$216.19 due under Washington's minimum wage law.⁸⁰ Shocking most observers who figured the Court would follow its previous decisions, the Court decided in favor of Ms. Parrish by reversing its prior minimum wage decisions and announced that minimum wage laws were indeed appropriate subjects of legislation after all.⁸¹

⁷⁶ See Quigley, *supra* note 49, at 523-24.

⁷⁷ See, e.g., NORDLUND, *supra* note 2, at 37-38; Quigley, *supra* note 49, at 523-24 & n.51.

⁷⁸ John W. Chambers, *The Big Switch: Justice Roberts and the Minimum Wage Cases*, 10 LAB. HIST. 44, 45 (1969) ("State minimum wage legislation was the focal point of the Court's conversion from an opponent into a supporter of social and economic reform."). This article provides an excellent history of the changes in the Supreme Court that resulted in the reversal over minimum wage and heralded the approval of most of the New Deal.

⁷⁹ 300 U.S. 379 (1937).

⁸⁰ *Parrish*, 300 U.S. at 386. The story of the organizational and legal strategy involved in this reversal is itself a fascinating story. See HART, *supra* note 2, at 87-150.

⁸¹ *Parrish*, 300 U.S. at 386. Justice Roberts, who had earlier joined the conservatives on the Court in invalidating minimum wage legislation now joined the liberal wing of the Court in supporting such laws. See Chambers, *supra* note 77, at 45 (providing a detailed look at the change of Justice Roberts' vote, and the debate ever since by scholars, lawyers and historians over why he did so).

Why Justice Roberts changed his vote, which apparently was cast though not announced before President Roosevelt's court-packing plan was publicly revealed, has been hotly contested since the day *Parrish* was decided. Some have argued

Their opinion noted, in an observation much lauded by living wage advocates:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. . . . The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.⁸²

With a green light from the Supreme Court, Roosevelt pushed for passage of the FLSA again in 1938. FDR was unrelenting in his view that employers who did not pay adequate wages had no business in business⁸³

With significant political modifications made necessary to insure its passage, the Fair Labor Standards Act was signed into law by FDR in 1938.⁸⁴ The new law imposed a twenty-five

that Roberts did not actually switch but instead merely ruled on the narrow questions before him. *See, e.g.,* Felix Frankfurter, *Mr. Justice Roberts*, 105 U. PA. L. REV. 311 (1955) (attempting to justify Roberts' switch on several non-political grounds). Few commentators now agree with this non-political theory.

⁸² *Parrish*, 300 U.S. at 399-400.

⁸³ 81 CONG. REC. 4960 (1937). FDR challenged the business leaders who opposed the law and stated:

[No one] let any calamity-howling executive with an income of \$1000 a day, who has been turning his employees over to the government relief rolls in order to preserve his company's undistributed reserves, tell you (using his stockholders money to pay the postage for his personal opinions) that a way of \$11 a week is going to have a disastrous effect on all American industry. Fortunately for business as a whole, and therefore for the nation, that type of executive is a rarity with whom most business executives heartily disagree.

Nordlund, *supra* note 39, at 719 (citing FRANKLIN D. ROOSEVELT, PUBLIC PAPERS AND ADDRESSES: THE CONTINUING STRUGGLE FOR LIBERALISM 392 (1941)).

⁸⁴ Nordlund, *supra* note 39, at 721. Until the end, some despaired that any wage and hour bill could be enacted because of the continuing opposition of Southern Democrats, the national business lobbies and the AFL. In order to salvage a wage and hour bill, changes to the bill were discussed that incorporated North-South wage differentials, initiating the hourly wage at less than forty cents per hour, and expanded the powers of the Labor Department at the expense of the previously suggested five person board.

cent per hour federal minimum wage on some employees working in interstate commerce that would be raised to forty cents an hour by 1945.⁸⁵ This time the Supreme Court upheld the minimum wage legislation.⁸⁶

The FLSA was a significant milestone in the progress towards the goal of establishing an enforceable minimum wage, but, as a result of the legislative compromises required for its enactment, it had major deficiencies.⁸⁷ A major deficiency of the FLSA was that it did not provide a living wage or even a "fair day's pay for a fair day's work" as it had originally been intended.⁸⁸ After the compromises made in order for the FLSA to be passed, the Act mandated a twenty-five cents an hour wage which was significantly less than the thirty-four and a half cent wage set by the D.C. Minimum Wage Board twenty years before.⁸⁹ The FLSA wage of twenty-five cents an hour was still a poverty wage in a time when the average hourly wage won through collective bargaining agreements in the unionized automobile industry in 1937 was eighty-eight cents an hour.⁹⁰ Of the eleven million workers actually covered by

Finally, since substantially different versions of the bill ultimately passed the House and Senate, a conference committee crafted a bill that gave labor the forty hour work week and forty cent minimum wage (after a two year phase-in that began at a forty-four hour work week and a minimum wage of twenty-five cents an hour), exempted a number of powerful industries from coverage and set up a single Labor Department administrator. 81 CONG. REC. 9158 (1938) (continuing debate about appropriations, cherry tree and the Jefferson Memorial).

⁸⁵ Fair Labor Standards Act of 1938, § 6(a), 52 Stat. 1060, 1062; see also NORDLUND, *supra* note 2, at 57 (summary of bill's provisions); Leffler, *supra* note 63, at 346-47.

⁸⁶ The Fair Labor Standards Act, including a federal minimum wage, was unanimously held constitutional in *United States v. Darby*, 312 U.S. 100 (1941). The Court held "it is no longer open to question that the fixing of a minimum wage is within the legislative power and that the bare fact of its exercise is not a denial of due process under the Fifth more than under the Fourteenth Amendment." *Darby*, 312 U.S. at 125.

⁸⁷ Quigley, *supra* note 49, at 529-36.

⁸⁸ The Conference Committee Report on the FLSA pointed out that the legislation was needed because of "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being." CONF. COMM. REP. NO. 2738, 75th Cong., at 28 (1938).

⁸⁹ *Children's Hosp. v. Adkins*, 284 F. 613, 615 (D.C. Cir. 1922).

⁹⁰ Samuel Herman, *The Administration and Enforcement of the Fair Labor Standards Act*, 5 LAW & CONTEMP. PROBS. 368, 368 (1939). For more on the di-

the FLSA at the time of its passage, only about 300,000 covered workers earned less than the original twenty-five cents per hour minimum.⁹¹

Another major deficiency was that the FLSA excluded millions of workers from its protection, many of whom needed the protection the most.⁹² The FLSA was politically crafted in such a way as to leave many workers out of its coverage, particularly women and African-American Southern workers by excluding from the statute's definition of covered employee such occupations as agricultural workers, domestic workers and others.⁹³ Most ironically, the work of chambermaids like that of Elsie Parrish, whose case made the FLSA possible, was excluded from coverage. In large part because of these exemptions, one critic noted that "the 'labor' protected by the FLSA was principally the white, male industrial class that needed protection least."⁹⁴ Thus, even after the historic enactment of the FLSA, a right to a living wage remained still much more of a hope than reality for large numbers of workers.

But the push for living wages continued, as can be seen in subsequent actions by Roosevelt and his administration. In December of 1941, the National Resources Planning Board (NRPB), an agency in the Executive Office of the President, mandated to consider problems of postwar adjustment, issued several reports, including one titled *Security, Work and Relief Policies*.⁹⁵ In that report, the NRPB proposed a "New Bill of

lution of the living wage goal of the FLSA, see PAULSEN, *supra* note 59, at 82-97.

⁹¹ See HART, *supra* note 2, at 152-53; see also Carroll R. Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 LAW & CONTEMP. PROBS. 406 (1939). Even when the FLSA made a forty-hour week at forty cents an hour minimum wage mandatory, seven years later those workers would still have an income of only one-third of that needed for a true living wage. PAULSEN, *supra* note 59, at 148.

⁹² Quigley, *supra* note 49, at 531-36.

⁹³ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1372-73 (1987) (giving excellent overview of role of race in enactment of FLSA); see also Quigley, *supra* note 49, at 532-35.

⁹⁴ HART, *supra* note 2, at 152.

⁹⁵ STEPHEN KEMP BAILEY, CONGRESS MAKES A LAW, THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 26 (1950); NAT'L RES. PLANNING BD., COMMITTEE ON LONG RANGE WORK & RELIEF POLICIES, SECURITY WORK AND RELIEF POLICIES

Rights," which included both a "right to work, usefully and creatively through the productive years" and a "right to fair pay, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift, and other socially valuable service."⁹⁶ The federal strategy for full employment was to include "formal acceptance by the Federal Government of responsibility for insuring jobs at decent pay to all those able to work regardless of whether or not they can pass a means test."⁹⁷

650 (Dec. 1941); see also ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 245-50 (1995).

⁹⁶ BAILEY, *supra* note 94, at 27 (citing N.Y. TIMES, Mar. 11, 1943, at 12). The rights outlined in this report include:

1. The right to work, usefully and creatively through the productive years.
2. The right to fair pay, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift, and other socially valuable service.
3. The right to adequate food, clothing, shelter and medical care.
4. The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment and accident.
5. The right to live in a system of free enterprise, free from compulsory labor, irresponsible private power, arbitrary public authority, and unregulated monopolies.
6. The right to come and go, to speak and to be silent, free from the spying of secret police.
7. The right to equality before the law, with equal access to justice in fact.
8. The right to education, for work, for citizenship, and for personal growth and happiness.
9. The right to rest, recreation and adventure, the opportunity to enjoy and take part in an advancing civilization.

Id. The NRPB is also discussed by MARGARET WEIR, *POLITICS AND JOBS: THE BOUNDARIES OF EMPLOYMENT POLICY IN THE UNITED STATES* 42-46 (1993).

⁹⁷ To guarantee the right to a job, activities in the provisions of physical facilities and services should be supplemented by:

- (1) Formal acceptance by the Federal Government of responsibility for insuring jobs at decent pay to all those able to work regardless of whether or not they can pass a means test.
- (2) The preparation of plans and programs, in addition to those recommended . . . for all kinds of socially useful work other than construction, arranged according to the variety of abilities and locations of persons seeking employment.
- (3) Expansion of the functions of the [U.S.] Employment Service, strengthening its personnel to the end that it may operate as the key mechanism in referring unemployed workers to jobs, whether public or private.

The NRPB, like previous New Dealers, regarded public works and public employment as the solutions to the unemployment problem. For those in need of steady work that the private economy could not provide, the NRPB felt the federal government should provide a job.⁹⁸

Keeping the ideal of a living wage alive, FDR, in 1944, proposed a "second Bill of Rights" under which a new basis of security and prosperity could be established for all, regardless of station, race or creed. This second Bill of Rights included: "The right to a useful and remunerative job in the industries or shops or farms or mines of the nation; The right to earn enough to provide adequate food and clothing and recreation."⁹⁹

Despite these calls for statutory living wages, little progress on the living wage law occurred on the federal level. In fact, the primary challenge for living and minimum wage supporters since 1938 has been to keep trying to raise the minimum wage provided for in the FLSA in order to keep up with the losses inflicted by inflation and to expand the coverage of

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- (4) Establishment of a permanent "Works Administration" under an appropriate Federal agency to administer the provision of jobs of socially desirable work for the otherwise unemployed.

PHILIP HARVEY, *SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES* 106 (1989) (citing U.S. National Resources Planning Board, *National Resources Development Report* 1943, 78th Cong., 1st sess., 1943, Doc. No. 128, Part 1, Post War Plan and Program, 17).

⁹⁸ THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 174 (1995).

⁹⁹ 90 CONG. REC. 57 (1944). The complete "second Bill of Rights" proposed by FDR includes:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; The right to earn enough to provide adequate food and clothing and recreation; The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education.

Id.

the law to more low-wage workers.¹⁰⁰

Despite the ups and downs in the real value of minimum wage, Congress has repeatedly pledged itself to the goal of a living wage for all workers. For example, in 1989, Congress pointed out that "[t]he purpose of the [FLSA] was and is to establish a floor below which wages would not fall, a floor which is adequate to support life and a measure of human dignity. It is a laudable legislative effort to ensure a just wage in return for a day's work."¹⁰¹

On the national level, as will be noted in a later section, there is a small but budding movement to require federal contractors to pay living wages to their employees.¹⁰² There has also been a recent push for a constitutional right to a job and a living wage propelled by the fledgling Labor Party, a new organization of progressive union members and their supporters.¹⁰³

While there has been a history of support for living wages, implementation on the federal level has proven quite difficult. The major focus of federal activity has been to try to keep raising the minimum wage so it does not continue to lose as much ground to inflation as it has in past decades. But, as the next section will re-emphasize, the minimum wage is no living wage.

IV. MINIMUM WAGE IS NO LIVING WAGE

The primary reason for the local living wage movement is that the federal minimum wage has failed to provide workers with sufficient wages to support themselves and their families. The current federal minimum wage of \$5.15 an hour went into effect September 1, 1997.¹⁰⁴ The value of the minimum wage continues to erode since its high point in the late 1960s and

¹⁰⁰ NORDLUND, *supra* note 2, at 59-199; Quigley, *supra* note 49, at 544-55.

¹⁰¹ S. REP. NO. 101-6, at 12 (1989).

¹⁰² See *infra* Part VIII.

¹⁰³ Dick Meister, *A Right to a Job and a Living Wage: Campaigns for a Constitutional Amendment*, THE SACRAMENTO BEE, Aug. 5, 1997, at B7; Adolph Reed, Jr., *A New Minimum: \$10 an Hour*, THE PROGRESSIVE, Apr. 1, 1997, at 16, available at 1997 WL 8972450; see also William P. Quigley, *The Right to Work and Earn a Living Wage*, 2 N.Y. CITY L. REV. 139 (1998).

¹⁰⁴ Pub. L. No. 104-188, § 2104(b) (1997) (codified as amended at 29 U.S.C. § 203 (1994 & Supp. V 1999)).

1970s. According to a 2001 report of the Congressional Research Service, the highest value of the minimum wage was reached in 1968.¹⁰⁵ Had the rate been adjusted to allow it to retain its 1968 value, the present minimum would be about \$7.72 per hour.¹⁰⁶

A White House estimate in early 2001 indicated that the minimum wage, which was worth only 65% of the 1968 minimum, would have had to be \$7.92 per hour in 2000 to equal the purchasing power of the minimum wage in 1968, and that inflation was eroding the value of the 1998 minimum wage by forty cents per hour per year, or about \$800 a year.¹⁰⁷

The legislative problem with the federal minimum wage is that it was too low from the outset, it is not indexed for inflation and it can only be raised by an act of Congress. When first passed in 1938, the FLSA only mandated a twenty-five cents an hour minimum wage, still a poverty wage.¹⁰⁸ Even as introduced and before it was diluted by legislative compromise, the FLSA only proposed a modest forty cents an hour minimum wage, barely above the thirty-four and one half cents an hour required by the District of Columbia in 1918, twenty years before. Of the eleven million workers actually covered by the FLSA at the time of its passage, only about 300,000 covered workers earned less than the original twenty-five cents per hour minimum.¹⁰⁹ Even when the FLSA made mandatory a minimum wage of forty cents an hour for a forty hour week seven years later, those workers would still have an income of

¹⁰⁵ See Whittaker, *supra* note 10.

¹⁰⁶ *Id.* Others suggest the minimum wage should actually be much higher. One article reports that the Bureau of Labor Statistics estimated the hourly wage would need to be between \$12 and \$14 an hour instead of the current \$5.15 to have the same earning power it had thirty years ago. Michael A. Verespej, *The Minimum Wage Is No Longer Living Wage*, INDUSTRY WK., May 1, 2000, available at 2000 WL 10594871. This author has been unable to independently verify that report.

¹⁰⁷ *White House Fact Sheet, Raising the Minimum Wage*, Jan. 8, 2001, U.S. NEWswire, available at 2001 WL 4138694.

¹⁰⁸ The twenty-five cents an hour FLSA wage was passed in 1937 when the average hourly wage in the unionized automobile industry was eighty-eight cents an hour. Herman, *supra* note 89, at 368 & n.4.

¹⁰⁹ HART, *supra* note 2, at 152-53; Daugherty, *supra* note 90, at 407-12.

only one-third of that needed for a true living wage.¹¹⁰ Also, because it has never been indexed for inflation, the federal minimum wage diminishes in value as soon as it is enacted.¹¹¹ Recent estimates suggest that the \$5.15 per hour minimum wage in effect in early 2001 was 30% lower in real value than the minimum wage was in 1968, even though the economy has become 50% more productive since then.¹¹²

Not even opponents of raising the minimum wage suggest that the minimum wage is a sufficient wage for a worker to live on or raise a family. Those who seek to do away with the minimum wage, or keep the minimum wage low, and who obviously oppose living wage ordinances, have never suggested the minimum wage is adequate for living. Opponents of raising the minimum wage make several arguments, including one that not all minimum wage workers are the only wage earner in their household; thus, no one should expect the minimum wage to be a living wage.¹¹³ While there is some truth in that argument, there is also some circularity in it since people who do not earn enough to live on usually are forced to live with family or others in order to share expenses because they do not earn enough to survive on their own. Opponents also argue that governmental support for increased minimum wages or enactment of living wages is not necessary because many low-wage workers are eligible for the Earned Income Tax Credit.¹¹⁴ There are also implicit problems with that argument since the Earned Income Tax Credit effectively requires all taxpayers, through legislation, to subsidize the wages of workers, thus benefitting specific business concerns.¹¹⁵

¹¹⁰ PAULSEN, *supra* note 59, at 148.

¹¹¹ Quigley, *supra* note 49, at 549-55.

¹¹² POLLIN & LUCE, *supra* note 2, at 1; Rasell, *supra* note 2; Alexander Cockburn, *Bill and Al Joust Across a Moral Divide*, SEATTLE TIMES, Feb. 15, 2001, at B7, available at 2001 WL 3500125.

¹¹³ EMPLOYMENT POLICIES INSTITUTE, LIVING WAGE POLICY: THE BASICS 29-37 (2000).

¹¹⁴ *Id.* at 30. The Earned Income Tax Credit provides a refundable tax credit to low-wage working families. See 26 U.S.C. § 32 (1994 & Supp. V 1999).

¹¹⁵ This is the same problem identified by the United States Supreme Court in the *Parrish* case:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless

Opponents, however, are correct that not all people who work at minimum wage jobs are the sole support of their families. Some minimum wage workers are part-time working teenagers who live with their families. But a look at who earns these low wages indicates that many are people who depend on their wages for support and whose families also depend on those same wages for support.

Research indicates that if the minimum wage was raised immediately in early 2001 by \$1.50 an hour, the amount proposed to be phased in over three years, 11.9 million workers, or 9.9% of the workforce would see an increase in wages.¹¹⁶ Despite the prevailing wisdom that only teenagers and part-time employees work for minimum wages, 68.2% of the workers affected would be over twenty years old and close to half, 45.3% of the workers, would be full-timers.¹¹⁷ The majority of the af-

against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.

W. Coast Hotel v. Parrish, 300 U.S. 379, 399-400 (1937).

¹¹⁶ Rasell, *supra* note 2.

¹¹⁷ *Id.* Other research organizations arrive at similar figures. See, e.g., ECONOMIC POLICY INSTITUTE, MINIMUM WAGE: FACTS AT A GLANCE, at <http://www.epinet.org/> (last visited Mar. 30, 2001); MAKING WAGES WORK, MINIMUM WAGE LEGISLATION AND LIVING WAGE CAMPAIGNS, at <http://makingwageswork.org/minimum.htm> (last visited Mar. 28, 2001). These sources indicate:

- 10.3 million workers (8.7% of the workforce) would receive an increase in their hourly wages if it raised to \$6.15 per hour.
- Another 9.7 million people (8.2% of the workforce) earning up to \$7.15 an hour would likely also get an increase.
- Almost one million single mothers with children under the age of eighteen would benefit from a \$1 minimum wage increase.
- More than two million married men and women with children would benefit from a \$1 increase in the minimum wage.
- Full time workers would benefit. Close to half (48%) of workers who would benefit from a minimum wage increase work full-time and another third work between twenty to thirty-four hours per week.
- Adults would benefit. Seventy-one percent of those workers who would get a raise if the minimum wage was raised by \$1 are age twenty or older.
- Women are the largest group who would benefit from a \$1 increase in the minimum wage. Almost 60% of the people who would get a raise would be

fectured workers would be women, 60.6%, and African-American and Hispanic workers would disproportionately benefit.¹¹⁸ In Louisiana, 13.3% of workers, or over 226,000 people, would get a raise; in Mississippi, 12.3% of workers, or over 137,000 people, would get a raise.¹¹⁹ State by state breakdowns of how many would have their wages raised are available.¹²⁰

Recent Democratic proposals for raising the minimum wage have pegged an increase to the \$1.50 an hour range. On February 14, 2001, Congressman Bonior introduced House Bill 665, the Fair Minimum Wage Act of 2001, seeking to raise minimum wage by \$1.50 over three years, to \$6.65 by January 1, 2003.¹²¹

A recent proposal by President Bush suggests that individual states should be allowed to opt out of any minimum wage increase, but this would likely only exacerbate the condition of low-wage workers, as the states most likely to opt out are exactly the same states that have high proportions of low-wage workers.¹²²

Because there is no real argument that workers can support themselves or their families on minimum wages, and there is no politically realistic proposal on the federal level to provide all workers with a federal living wage, efforts to enact living wages continue to have a local government focus.

V. CALCULATING A LIVING WAGE

A living wage is a wage that enables a worker to earn enough to lift herself and her family out of poverty. A living

women.

¹¹⁸ Rasell, *supra* note 2, at 2.

¹¹⁹ *Id.*

¹²⁰ *Id.* at tbl. 2.

¹²¹ Fair Minimum Wage Act of 2001, H.R. 665, 107th Cong. § 2(a) (2001). The bill would raise the minimum wage to \$5.75 an hour thirty days after enactment, then raise it to \$6.25 an hour beginning January 1, 2002 and to \$6.65 an hour beginning January 1, 2003. *See id.*

¹²² "President Bush favors a minimum wage proposal giving states the ability to set their own rates so long as those rates do not fall below the present national minimum." *Boston Works: Benefits Laid-off Warned on 401(k) Withdrawals Out in the Field*, BOSTON GLOBE, Feb. 18, 2001, at H2, available at 2001 WL 3921018; *see also* Rasell, *supra* note 2, at 2 (illustrating impact of proposal).

wage allows a worker to become self-sufficient. But how much must a worker earn in order to be able to lift a family out of poverty and become self-sufficient? The calculation of a living wage depends in large part on how one calculates what poverty is and how much it costs to become self supporting.

A common method to calculate a living wage is to see how much a person would need to earn to have income above the Federal Poverty Guidelines.¹²³ While there are serious drawbacks to this approach because the government poverty guidelines are frequently criticized as unrealistically low by many people who work with the poor, they remain the minimum upon which to build any discussion of living wages.¹²⁴

¹²³ See Annual Update of the HHS Poverty Guidelines, 65 Fed. Reg. 7555, 7555-57 (Feb. 15, 2000) (providing 2000 guidelines to calculate how much person must earn to be above federal poverty level). These guidelines are adjusted annually for inflation.

¹²⁴ One of the problems with pegging a living wage calculation is the inadequacy of the poverty guidelines. The current official government poverty line originated in poverty thresholds created by the Social Security Administration (SSA) in 1963.

That measure was soon adopted by other federal agencies as the official poverty threshold, and the Census Bureau started publishing annual statistics on poverty in 1967. The original line was calculated by SSA staff economist Mollie Orshansky using two prior government surveys. Federal researchers had surveyed families and estimated that in prior years families generally spent about one-third of their income on food. The United States Department of Agriculture (USDA) conducted surveys in 1955 which calculated the food buying patterns of lower income families. The USDA came up with four food plans, the lowest cost of which was the "Economy Food Plan" which was designed for "temporary or emergency use when funds are low." The SSA then multiplied the dollar figure for the lowest cost of the four plans by three and came up with an estimate of what income was required for a family to earn enough to eat.

Initially, adjustments were made for the size of the families, the gender of the family head, the ages of the people in the family and whether they lived in urban or rural areas (figuring that country people did not need as much because they could grow some of their own food). The result was the first rough estimate of who was poor and who was not. If a family had income higher than the established line, they were officially not poor; if their income was lower than the line, they were officially counted among the poor. With minor modifications (dropping the age, gender and county/city differences), these figures have been annually recalculated by the Census Bureau in light of the Consumer Price Index and continue to be the way we officially define poverty. Thus, the current official calculation of poverty compares the pre-tax cash income of a person or family to determine if it is above or below the annually recalculated poverty threshold. See REBECCA M. BLANK, *IT TAKES A NATION* 10-12 (1997); NATIONAL RESEARCH COUN-

For a single parent with two children, the official poverty guideline for the year 2000 was a yearly income of \$14,150.¹²⁵ For a single parent with three children, the yearly income was \$17,050.¹²⁶ For a full-time worker, this means that a parent with two children would need to make at least \$6.80 per hour, and a parent with three children would need to earn \$8.20 per hour, in order to at least be lifted over the 2000 official poverty threshold. Several cities have pegged their living wage ordinances directly to the poverty guidelines.¹²⁷

The problem with this approach is that \$7 to \$8 an hour, while a great improvement over minimum wage, is still not enough for a worker to raise a family out of poverty. Such workers still need government assistance to be able to survive, and government program eligibility guidelines reflect that. People earning poverty level wages cannot realistically purchase health insurance, and full-time workers with three children can earn over \$10 an hour and still be impoverished enough to remain eligible for food stamps.¹²⁸ Workers with two children are eligible for the Earned Income Tax Credit even if they make over \$14 an hour.¹²⁹

CIL, MEASURING POVERTY: A NEW APPROACH 17, 24-31 (Constance F. Citro & Robert T. Michael eds., 1995); PATRICIA RUGGLES, DRAWING THE LINE: ALTERNATIVE POVERTY MEASURES AND THEIR IMPLICATIONS FOR PUBLIC POLICY 32-35 (1990); Thesia I. Garner et al., *Experimental Poverty Measurement for the 1990s*, MONTHLY LAB. REV. 39, 40 (Mar. 1998).

¹²⁵ OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEPT. OF HEALTH & HUMAN SERVICES, THE 2000 HHS POVERTY GUIDELINES (2000), at <http://aspe.hhs.gov/poverty/00poverty.htm> (last visited Mar. 30, 2001) (providing poverty guidelines for 2000).

¹²⁶ *Id.*

¹²⁷ See *infra* tbl., p. 960-64.

¹²⁸ See FOOD AND NUTRITION SERVICE, USDA, FOOD STAMP PROGRAM INCOME ELIGIBILITY STANDARDS October 1, 2000–September 30, 2001, at <http://www.fns.usda.gov/fsp/MENU/ADMIN/CERTIFICATION/SUPPORT/IncomeStandards2000.htm> (last visited Mar. 30, 2001) (providing food stamp eligibility guidelines and illustrating that, in 2000, food stamp eligibility cut off at \$1,848 per month; this translates into \$22,176 per year, or \$10.66 an hour for full-time worker).

¹²⁹ For information on the Earned Income Tax Credit, see INTERNAL REVENUE SERVICE, EARNED INCOME TAX CREDIT (EITC), at http://www.irs.gov/ind_info/eitc4.html (last visited Mar. 30, 2001). In 2001, workers with two or more children could qualify for the EITC if they earned less than \$32,121, which equals \$15.44 at hour for full-time workers, or in 2000, if they earned \$31,152, which

And it is not just government statistics that recognize substantial wages are necessary for survival. In the fall of 2000, the National Low Income Housing Coalition discovered, after a national survey of fair market rentals, that the average person who worked forty hours a week would need to earn \$12.47 an hour to rent a two bedroom apartment.¹³⁰ Likewise, religious leaders in early 2000 called for a national living wage of \$25,000 plus health care benefits.¹³¹

Critics say the current official definition of poverty is too low and thus substantially undercounts the real number of poor persons, particularly the numbers of working poor people. In fact, the National Research Council (which has thoroughly studied the poverty thresholds) has concluded that there are at least ten different ways to calculate the poverty line, all of which would increase the poverty thresholds from 21% to over 50% higher than current levels.¹³²

It is also true that other critics think the current official

equals \$14.97 an hour for full-time workers. *Id.*

¹³⁰ NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH: THE GROWING GAP BETWEEN HOUSING COSTS AND INCOME OF POOR PEOPLE IN THE UNITED STATES, at <http://www.nlihc.org/oor2000> (last visited Mar. 30, 2001).

¹³¹ Shelvia Dancy, *Living Wage, Affordable Housing Urged for All*, ARIZ. HERALD, Jan. 16, 2000, at J3.

¹³² See NATIONAL RESEARCH COUNCIL, *supra* note 123, at 24-31. Critics first point out the current calculation counts pre-tax income as income and disregards the federal, state and local taxes that the poor, particularly the working poor, must pay. If after-tax income was used as income, many more working poor people would fall below the current line, thus expanding the numbers of people in poverty. Second, these critics point out that family expenditures on food no longer constitute one-third of a family's expenses but, rather, consume only about one-fifth of family spending. They thus conclude that multiplying the costs of food by five rather than three would be more accurate. This would raise the poverty line and expand the numbers of people below it. Third, they point out that when the poverty line was first set in the 1960s, it was half of the median income for a family of four (a standard widely used to define poverty in Europe today), but has drifted downward to only about 40% of median family income, again understating the number of people in poverty. They also point out the current method effectively assumes the same standard of living as the late 1950s, despite widespread changes. If changes were made to correct these deficiencies, these critics suggest the poverty line would be raised by 50% to make it more realistic and include millions more people, mainly many more of the working poor, within the official definition of poverty. See RUGGLES, *supra* note 123; S.M. Miller & Else Oyen, *Remeasuring Poverty*, 5 POVERTY & RACE (Poverty & Race Research Action Council, Washington, D.C.), Sept.-Oct. 1996, at 1.

definition of poverty overestimates the number of people in poverty. Their criticisms are primarily based on the manner in which the current method evaluates income of people and calculates inflation. Currently, the Census Bureau counts all pre-tax income, including income from cash welfare programs like social security, disability income and welfare, but does not count as income other non-cash governmental benefits like food stamps, medical care, social services, education, training and housing benefits. Because the Census Bureau does not calculate assets, people with large savings or significant resources, such as houses, but low incomes in a year are erroneously counted as poor. These critics also urge that inflation should not be calculated using the Consumer Price Index, which includes increases or decreases in the cost of buying a house, but rather on an alternative scale that incorporates adjustments in the cost of renting a house. They conclude that by using the alternative index for inflation and another definition of income that includes state and federal tax benefits, employer-provided benefits, food stamps, housing, school lunch and a fungible value for some government-provided health care, the number of people in poverty would decrease substantially from current levels, lifting millions of people over the poverty line.¹³³

Because the official poverty threshold is so low, advocates for the working poor often look to the food stamp guidelines for a more realistic income to determine what kind of living wage is necessary to lift a family out of poverty. Since food stamp guidelines are 130% of the official poverty thresholds, a parent with two children would have to earn well over \$8 an hour for a living wage, and a family with three children would need over \$10 an hour to lift their families to 130% of the 2000 poverty line. This is what St. Louis voters used in 2000 when they pegged their city's living wage ordinance at 130% of the federal

¹³³ See U.S. HOUSE OF REPS., COMMITTEE ON WAYS AND MEANS, GREEN BOOK app. H, at 1305-09 (1998) (discussing "Poverty Under Alternative Measures of Income and Price Inflation"), available at <http://aspe.hhs.gov/2000gb/>; see also Robert Rector, *The Myth of Widespread American Poverty*, in BACKGROUNDER No. 1221 (The Heritage Foundation, Washington, D.C.), Sept. 18, 1998 (revealing much dispute over this position, but provocative nonetheless), available at <http://www.heritage.org/library/backgrounder/bg1221.html>.

poverty guideline for a family of three, which is \$8.67 an hour with benefits and \$9.92 an hour without benefits.¹³⁴

Any calculation of a true living wage must recognize what common sense and our government has long recognized—that wages far higher than minimum wage still leave families in need. A challenge for the living wage movement is to continue to try to make the legislative enactment of living wage ordinances define wages sufficiently generous to enable workers to become self-supporting.

A. *Local Government and Living Wage Ordinances*

More than fifty jurisdictions have enacted living wage ordinances, and another seventy-five or so have ongoing living wage campaigns.¹³⁵ While most of these ordinances apply to businesses within a jurisdiction that have public contracts with local government, jurisdictions define a variety of hourly rates as living wages, and apply them in quite different ways as well. This section will illustrate and analyze some of the variations in existing living wage ordinances in terms of the hourly rates required for wages and the scope and coverage of local ordinances.

B. *Hourly Wage Defined as Living Wage*

The first element of a local living wage ordinance is the definition of what is the minimum hourly rate that businesses are required to pay in order to comply with the law. Local living wage ordinances set living wage amounts at quite different levels. Some cities set an hourly rate in the ordinance as the living wage required to be paid by businesses having public contracts. Some index the hourly wage to inflation. Others peg the living wage to a percentage of the poverty level for a family of three, or in some cases four, members. Some cities require benefits like health insurance to be paid in addition to a fixed hourly rate.¹³⁶ In other cities, the living wage is characterized

¹³⁴ See *supra* note 36 and accompanying text.

¹³⁵ See Hirschman, *supra* note 5, at 3436. For a discussion of extensive local government campaigns to enact living wage ordinances, see *supra* note 8 and accompanying text.

¹³⁶ For example, Oakland requires \$8.30 with benefits and \$9.55 without, but

as either an hourly wage that has to be paid if the employer is paying benefits or another higher hourly wage when the business does not pay benefits. Below is a selective list of cities and their living wage laws, current as of early 2001:¹³⁷

LIVING WAGE HOURLY RATE TABLE

City	Living Wage	Living Wage If No Benefits Paid
Alexandria, VA ¹³⁸	\$9.84 (indexed for inflation)	
Baltimore, MD ¹³⁹	\$7.70	
Berkeley, CA	\$9.75 with benefits	\$11.37 without benefits
Boston, MA ¹⁴⁰	\$8.43	
Buffalo, NY	\$7.15 with benefits	\$8.15 without benefits

defines benefits to include twelve paid and ten unpaid days of leave each year; San Francisco requires \$11 an hour plus benefits of health coverage, paid vacation and sick leave. See EMPLOYMENT POLICIES INSTITUTE, *supra* note 112, at 73.

¹³⁷ The sources for these cities and their wage laws is, unless otherwise noted, LivingWage.com's website. See <http://www.livingwage.com> (last visited Mar. 1, 2001). The Economic Policy Institute also has a table on their website listing living wage ordinances that cover contractors and subsidy recipients. See <http://www.epinet.org> (last visited Mar. 1, 2001). A good source for living wage ordinances and proposed ordinances is the Employment Policy Institute. See <http://www.epionline.org> (last visited Mar. 15, 2001) (containing list of living wage ordinances and proposals).

¹³⁸ The Alexandria City Council unanimously passed its living wage ordinance June 17, 2000. *Minimum Wage: City in Alexandria in Virginia Approves New Living Wage Ordinance for City Contractors*, 119 DAILY LAB. REP. (BNA), at A-6 (June 20, 2000) [hereinafter *City in Alexandria*]; Frederick Kunkle & Craig Thomas, *Alexandria Officials Aim to Defend Living Wage; Legislators Attack Law Promising \$9.84 an Hour*, WASH. POST, Feb. 1, 2001, at B-4 (discussing effort underway in state legislature to pre-empt current Alexandria law requiring city contractors to pay \$9.84 per hour including insurance, to employees on city contracts), available at 2001 WL 2541077.

¹³⁹ See Steven Brull, *What's So Bad About a Living Wage?*, BUS. WK., Sept. 4, 2000, at 68. All contracts over \$5000 with the City of Baltimore require the contractor to pay a wage of \$7.70 per hour. Mike Bowler, *Hopkins Protesters Encamp for Living Wage; Demonstrators Urge Minimum Hourly Rate of \$7.90 at Institution*, at 68 BALT. SUN, Mar. 9, 2000, at 1B, available at 2000 WL 4860297.

¹⁴⁰ See Spectar, *supra* note 2, at 86 (detailing Boston living wage ordinances).

Cambridge, MA	\$10.00	
Chicago, IL ¹⁴¹	\$7.60	
Cleveland, OH	\$8.20	
Dane County, WI	\$8.03	
Denver, CO	\$8.03 (indexed to federal poverty level for family of four)	
Des Moines, IA	\$9.00	
Detroit, MI ¹⁴²	\$8.35 with benefits	\$10.44 without benefits
Duluth, MI	\$6.50 with benefits	\$7.25 without benefits
Durham, NC	\$7.55	
Eau Claire, WI	\$6.67 with benefits	\$7.40 without benefits
Hartford, CT	110% of family of four (benefits required)	

¹⁴¹ See Brull, *supra* note 138, at 68 (stating City of Chicago must pay its clerical workers wage of \$7.60 per hour); see also Markov et al., *Cook County and Chicago Mandate Living Wages*, 9 ILL. EMP. L. LETTER 4, at 3 (1998); Spectar, *supra* note 2, at 86 (discussing Chicago Code sections).

¹⁴² See Brull, *supra* note 138, at 68 (stating all service contracts with City of Detroit worth over \$50,000 require employees to be paid \$10.70 per hour wage); see also Spectar, *supra* note 2, at 84 n.121 (discussing Detroit living wage ordinances).

Detroit's living wage ordinance, which was enacted after a ballot initiative passed with 80% of the vote, requires wages of 125% of the federal poverty level for a family of four. See *id.* It applies to all service contracts over \$50,000 and any business who is the

recipient of any financial assistance from the City in excess of \$50,000, including any federal grant administered by the City, revenue bond financing, planning assistance, tax increment financing, tax credits or any other form of assistance, if the purpose of the assistance is economic development or job growth, including any contractors, subcontractors or leaseholders, at the subsidized site.

Emily C. Palacios, *Detroit's Public Contracting Policies: Is it Time for a Change?*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 242, 246 (2000) (citing DETROIT, MICH., DETROIT CITY CODE § 18-5-73 (1998)).

Hayward, CA	\$8.00 with benefits	\$9.25 without benefits
Jersey City, NJ	\$7.50 (benefits required)	
Los Angeles, CA ¹⁴³	\$8.97	
Madison, WI	\$7.91 with benefits	\$9.25 without benefits
Miami, FL ¹⁴⁴	\$8.56 with benefits	\$9.81 without benefits
Milwaukee, WI	\$6.67 (indexed to poverty level of family of three)	
Minneapolis, MN	\$8.83 (indexed to poverty level of family of four)	
Oakland, CA ¹⁴⁵	\$8.35 with benefits	\$9.60 without benefits
Omaha, NE ¹⁴⁶	\$7.91	

¹⁴³ See Brull, *supra* note 138, at 68 (stating all service contracts with City of Los Angeles over \$25,000 require employees to be paid wage of \$8.97 per hour); see also Spectar, *supra* note 2, at 87-88 (discussing Los Angeles' living wage provisions).

¹⁴⁴ In Miami-Dade County, employers bidding on new government contracts of \$100,000 or more must pay a living wage of \$8.56 plus health benefits with wage increases tied to the consumer price index. William Carlisle, *Minimum Wage: Tucson, Ariz., Adopts 'Living Wage' Ordinance; Applies to City Contractors*, 178 DAILY LAB. REP. (BNA), at A-9 (Sept. 15, 1999).

¹⁴⁵ See Littler Mendelson, *Oakland Living Wage Ordinance Imposes Strict Minimum Standards*, 8 CAL. EMP. L. MONITOR 7 (1998) [hereinafter *Oakland Living Wage*]. The ordinance was unanimously passed by the Oakland City Council on March 24, 1998. It applies to all employers with city contracts over \$25,000, or city subsidies over \$100,000. In addition to guaranteeing living wages, the ordinance requires at least twelve days of compensated time off per year for sick, vacation or personal leave and ten days of uncompensated time off for other reasons.

The Oakland living ordinance covers not only employees of businesses with city contracts of over \$25,000 but any entity receiving financial assistance from the city, including grants, rent subsidies, bond financing, tax credits or even loan forgiveness, of more than \$100,000 in a twelve-month period. Littler Mendelson, *Living Wage Ordinances—A Kinder Gentler Law With Bite*, 8 CAL. EMP. L. MONITOR 4 (1999) [hereinafter *Law With Bite*]; see also Spectar, *supra* note 2, at 87 (discussing Oakland living wage ordinances).

¹⁴⁶ Rick Ruggles & Paul Goodsell, *Wage Law's Cost to City Unclear*, OMAHA WORLD-HERALD, Mar. 8, 2000, at 1, available at 2000 WL 4357197.

Pasadena, CA	\$7.25 with benefits	\$8.50 without benefits
Portland, OR ¹⁴⁷	\$8.00 (requires benefits)	
San Antonio, TX	\$9.27 with benefits	\$10.13 without benefits
St. Louis, MO ¹⁴⁸	\$8.84 with benefits	\$10.23 without benefits
St. Paul, MN ¹⁴⁹	\$8.03 with benefits	\$8.83 without benefits
San Fernando, CA	\$8.50	
San Francisco, CA ¹⁵⁰	\$10.00 (benefits required)	
San Jose, CA ¹⁵¹	\$9.50 with benefits	\$10.75 without benefits
Santa Clara, CA	\$10.00 (benefits required)	
Santa Cruz, CA ¹⁵²	\$11.00 with benefits	\$12.00 without benefits
Somerville, MA	\$8.35	

¹⁴⁷ *Minimum Wage: Portland Ordinance Raises Wages, Requires Health Benefits for Contractors' Employees*, 87 DAILY LAB. REP. (BNA), at A-6 (May 6, 1998) [hereinafter *Portland Ordinance*]. Portland's Fair Wage policy required living wages to be paid to companies that contract with the city for janitors, security guards and parking lot attendants; the city estimated that only about 100 such workers would directly benefit. *Id.*; see also Spectar, *supra* note 2, at 86-87 (discussing Portland's living wage ordinances).

¹⁴⁸ Betz, *supra* note 36, at A-3; see *supra* note 36. The law sets hourly wages for city contractors and companies that receive city tax breaks, grant money or other forms of aid at \$8.67 with benefits or \$9.92 without benefits. *Id.*; see also David Nicklaus, "Living Wage Law": Will the "Living Wage" Law Help or Hurt the City's Poor?, ST. LOUIS POST DISPATCH, Sept. 6, 2000, at C1 (explaining law applies to city contracts and to companies receiving city tax breaks), available at 2000 WL 3546140.

¹⁴⁹ Under the St. Paul ordinance, covered businesses are only required to pay a living wage after an employee has been on the job for one year. Spectar, *supra* note 2, at 84 n.120.

¹⁵⁰ Brull, *supra* note 138 (stating all service contracts with City of San Francisco over \$25,000 and all airport and home health contracts require employees to be paid wage of \$10.00 per hour).

¹⁵¹ *Id.* All service contracts with City of San Jose over \$20,000 require employees to be paid wage of \$10.75 per hour.

¹⁵² *Santa Cruz Approves \$12 Minimum Wage*, ORANGE COUNTY REGISTER, Oct. 14, 2000, at A4, available at 2000 WL 4855748; see *supra* note 4 and accompanying text.

Toledo, OH	\$8.84 with benefits	\$10.14 without benefits
Tucson, AZ ¹⁵³	\$8.00 with benefits	\$9.00 without benefits
Warren, MI	\$8.35 with benefits	\$10.44 without benefits
West Hollywood, CA	\$7.25 with benefits	\$ 8.50 without benefits
Ypsilanti, MI	\$8.50 with benefits	\$10.00 without benefits

The variations in living wage rates are substantial, from a low of \$6.50 an hour plus benefits in Duluth (\$13,520 a year) to a high of \$11.00 an hour plus benefits in Santa Cruz (\$22,800). Recall that the living wage advocates in Santa Cruz were seeking \$27.00 an hour based on the local high cost of living.¹⁵⁴ The coverage and operation of living wage ordinances are likewise varied.

VI. COVERAGE OF LOCAL LIVING WAGE ORDINANCES

Most living wage ordinances require companies which hold contracts over a certain dollar amount with local government to pay their employees—at least those who are hired to perform the work contracted for with the local government—a living wage. Coverage varies substantially. Some jurisdictions require that all jobs created by public contract must comply, while others exempt small contractors or non-profit contractors. While there have been a few proposed living wage ordinances which would apply to all businesses in the jurisdiction, operating like a local minimum wage, none of these have yet been enacted.¹⁵⁵ This section will concentrate only on ordinances

¹⁵³ The Tucson ordinance (Ordinance 9274) applies to contracts awarded or renewed after January 1, 1999 for city contractors in building maintenance, refuse collection and recycling, temporary employee services, janitorial and custodial, pest control, security and moving services. The wage amount is subject to annual review. Carlisle, *supra* note 144, at A-9.

Although the state legislature tried to overturn the law in 2000, the attempt failed. *Tucson Living Wage Ordinance Still in Effect*, 80 DAILY LAB. REP. (BNA), at A-9 (Apr. 25, 2000) [hereinafter *Tucson Living Wage*].

¹⁵⁴ See *supra* note 4 and accompanying text.

¹⁵⁵ For a discussion on these comprehensive living wage ordinances, see *infra* text pp. 978-79, in the section on the future of the living wage movement.

which have been enacted.

Most living wage ordinances apply to businesses that receive over a specified threshold amount of money in a local contract, and include a definition of what types of public contracts or public benefits are covered.

A. *Living Wage Ordinances Across the Country*

The following cities are examples of the straightforward application of local living wage law to certain categories of public contractors: the Baltimore living wage law applies to businesses with local public contracts over \$5000;¹⁵⁶ Santa Cruz applies its living wage law to public contractors which have received over \$10,000 annually;¹⁵⁷ and Miami-Dade County requires all employers bidding on contracts over \$100,000 to pay living wages.¹⁵⁸

However, several cities do not restrict their living wage mandate only to businesses which are parties to local public contracts, but also apply the living wage law requirements to other businesses which receive governmental benefits.

St. Louis, for example, requires living wages be paid by all city contractors and all companies which receive city tax breaks, grant money or other forms of public aid.¹⁵⁹ Oakland applies its living wage law to companies receiving city contracts over \$25,000 and also to any entity which received more than \$100,000 annually in financial assistance from the city, including grants, rent subsidies, bond financing, tax credits and loan

¹⁵⁶ For a discussion of BALTIMORE, MD., ORDINANCE NO. 442 (1994), see Spectar, *supra* note 2, at 83-84, 116-19 and Brull, *supra* note 138, at 68. All businesses must pay a wage to its employees of \$7.70 an hour for work done pursuant to contracts with the city of Baltimore over \$5000. See Bowler, *supra* note 137, at 1B.

¹⁵⁷ See *supra* note 4 and accompanying text. Santa Cruz requires contractors that receive contracts of \$10,000 or more to pay a living wage to workers.

¹⁵⁸ In Miami-Dade County, employers bidding on new government contracts of \$100,000 or more must pay a living wage of \$8.56 plus health benefits. Increases are tied to the consumer price index. See *supra* note 144.

¹⁵⁹ See *supra* note 148 and accompanying text. The hourly rate is set at 130% of federal poverty guidelines for a family of three. See Betz, *supra* note 36; see also Nicklaus, *supra* note 147, at C1. The law applies to city contracts and to companies receiving city tax breaks.

forgiveness.¹⁶⁰ Detroit requires living wages be paid by all businesses receiving public service contracts over \$50,000 and any other businesses which receive financial assistance worth over \$50,000 from the city including federal grants administered by the city, revenue bond financing and tax credits.¹⁶¹ Contractors, subcontractors and leaseholders involved with the subsidized business are also required to pay a living wage.¹⁶² The Los Angeles Living Wage Ordinance requires a living wage be paid by several types of businesses: firms with service contracts over \$25,000, recipients of bond financing and other subsidies worth at least \$1,000,000 a year and city lessees and licensees with \$200,000 or more in annual revenues and eight or more employees.¹⁶³ Gary, Indiana, requires recipients of tax abatements to pay living wages.¹⁶⁴ Houston requires living wages to be paid by companies that receive tax abatement.¹⁶⁵

Some living wage ordinances exempt non-profits and do not apply to certain categories of workers. Santa Cruz exempts businesses or nonprofits with fewer than five employees, employees under eighteen years of age and businesses that have collective bargaining agreements or already pay higher wages than those required.¹⁶⁶ San Antonio requires companies that

¹⁶⁰ See *supra* note 145. The Oakland Living Wage ordinance, which became effective July 1, 1998, requires living wages of \$8 per hour if the employer is paying health benefits and \$9.25 an hour if no benefits are provided. The law also requires living wages to be paid by subcontractors and tenants of covered businesses. Covered businesses are required to comply and to report quarterly on the names of employees and their compensation for the duration of the contract. Noncompliance disqualifies the business from bidding on future contracts and there are also provisions for fines and restitution for underpaid employees. Employees are given a private right of action to enforce the law and if successful can recover attorney fees. See *Oakland Living Wage*, *supra* note 145.

¹⁶¹ See Palacios, *supra* note 141, at 246.

¹⁶² *Id.* at 247; see *supra* note 142.

¹⁶³ Hirschman, *supra* note 5, at 3436.

¹⁶⁴ For a comprehensive list of different municipal living wage plans and proposals, see EMPLOYMENT POLICIES INSTITUTE, LIVING WAGE ACTIVITY [hereinafter EPI Plans & Proposals], at http://www.epinonline.org/livingwage/w_proposals.cfm?state=AllStates (last visited Mar. 9, 2001).

¹⁶⁵ *Id.*

¹⁶⁶ SANTA CRUZ, CAL., MUNICIPAL CODE §§ 5.10.020-5.10.80 (2000), available at <http://www.ci.santa-cruz.ca.us/>; see also *supra* note 155.

receive tax abatements to pay 70% of their new employees at least \$9.27 an hour and, if they are a durable goods manufacturer, pay 70% of their employees \$10.13 an hour.¹⁶⁷

This sampling of a few of the fifty living wage ordinances demonstrates substantial variations in hourly amounts that constitute living wages and the scope and coverage of the local laws. As these communities collect information from the impact of these relatively new laws, the various hourly rates and the varying thresholds of coverage should provide a wealth of legal and economic experience for the living wage movement and its opponents to analyze. The variations are a tribute to the willingness of local jurisdictions to allow the law to develop in a way that has not appeared possible on the federal or state level.

VII. STATE WAGE LAWS

Living wage campaigns have not made much recent progress on the state level in raising the minimum wage above the federal level for all workers in a state. As the table below shows, twenty-six states match the federal rate, nine states and the District of Columbia have higher minimums, and the remaining states have lower rates than the federal rate. The one area where many states have historically mandated higher than minimum wages is in the area of certain public contracts, usually construction projects.¹⁶⁸ Advocates must be knowledgeable about the state minimum wage law because, as a

¹⁶⁷ Michael A. Verespej, *The Minimum Is No Longer Living Wage*, *INDUSTRY WK.*, May 1, 2000, at 18; see also *supra* note 163.

¹⁶⁸ State "prevailing wage" laws, which mandate that private businesses pay higher wages as a condition of performing certain state contracts are usually called "little Davis-Bacons" after the federal prevailing wage law by that name. The federal Davis-Bacon Act requires government contracts over \$2000 to pay prevailing wages on all construction, alteration or repair of public buildings or public works. See 40 U.S.C. § 276(a) (1994 & Supp. V 1999). There are about thirty-three such state laws, usually applying to public construction projects. Herbert Northup & Augustus White, *Subsidizing Contracts to Gain Employment: Construction Union Job Targeting*, 17 *BERKELEY J. EMP. & LAB. L.* 62, 80 (1996). See generally Annotation, *Employee's Private Right of Action to Enforce State Statute Requiring Payment of Prevailing Wages on Public Works Projects*, 10 *A.L.R.* 5th 360 (1993) (discussing state minimum wage laws for public contracts).

subsequent section will show, opponents of living wage laws have had some success in prohibiting local jurisdictions from setting local living wage laws higher than the state minimum wage law.¹⁶⁹

*A. State Minimum Wage Table*¹⁷⁰

Additionally, each state that has a lower minimum wage than the FLSA minimum or no minimum wage does not apply that law if the employer is covered by the FLSA.

State	Minimum Wage
Alabama	No minimum
Alaska	\$0.50 over FLSA minimum
Arizona	No minimum
Arkansas	\$5.15
California	\$6.25, will raise to \$6.75 Jan. 1, 2002
Colorado	\$5.15
Connecticut	\$6.40, will raise to \$6.70 after Jan. 1, 2002
Delaware	\$6.15
D.C.	\$1.00 over FLSA minimum
Florida	No minimum
Georgia	\$3.25
Hawaii	\$5.25
Idaho	\$5.15
Illinois	Adopts FLSA minimum
Indiana	\$5.15
Iowa	Adopts FLSA minimum
Kansas	\$2.65
Kentucky	\$5.15
Louisiana	No minimum

¹⁶⁹ See *infra* notes 178-84 and accompanying text (discussing opposition to living wages).

¹⁷⁰ Unless otherwise noted, the information on state minimum wage laws is taken from the United States Department of Labor website on state minimum wage laws. U.S. DEPT OF LABOR, MINIMUM WAGE LAWS IN THE STATES, at <http://www.dol.gov/dol/esa/public/minwage/america.htm> (last visited Apr. 1, 2001).

Maine	\$5.15
Maryland	\$5.15
Massachusetts	\$6.75
Michigan	\$5.15
Minnesota	\$4.90-\$5.15 depending on size of employer
Mississippi	No minimum
Montana	\$4.00-\$5.15 depending on size of employer
Nebraska	\$5.15
Nevada	\$5.15
New Hampshire	\$5.15
New Jersey	\$5.15
New Mexico	\$4.25
New York	\$5.15
North Carolina	\$5.15
North Dakota	\$5.15
Ohio	\$2.80-\$4.25 depending on size of employer
Oklahoma	\$2.00-\$5.15 depending on size of employer
Oregon	\$6.50
Pennsylvania	\$5.15
Rhode Island	\$6.15
South Carolina	No minimum
South Dakota	\$5.15
Tennessee	No minimum
Texas	\$3.35
Utah	\$5.15
Vermont	\$5.75
Virginia	\$5.15
Washington	\$6.72 and indexed to inflation
West Virginia	\$5.15
Wisconsin	\$5.15
Wyoming	\$1.60

While state hourly rates that are higher than the federal minimum rate are not nearly at the levels of local living wage ordinances, their sweeping coverage and breadth, which typically apply to nearly all workers statewide, make these laws applicable to many more workers than any local living wage ordinance.

VIII. FEDERAL GOVERNMENT AND LIVING WAGE

While most of the effort of the living wage movement has been dedicated to the enactment of living wages on the local level, there is a recent effort on the federal level that should be briefly noted. Legislative efforts have been organized on the federal level to extend living wages to large companies and local governments with federal contracts, requiring them to pay their workers at least \$8.20 an hour.¹⁷¹

In May of 2000, Representative Luis Gutierrez (D-Ill), and eighty-three House co-sponsors, introduced the "Federal Living Wage Responsibility Act" legislation to require federal contractors to pay workers on federal contracts at least \$8.20 an hour.¹⁷² Similar legislation had been offered by Rep. Gutierrez in two prior sessions.¹⁷³ The 2000 legislation specifically keyed hourly wages for employees of federal contracts over \$10,000 to an amount sufficient to earn enough to meet the federal poverty threshold for a family of four, which in 2000 was \$8.20 an hour.¹⁷⁴

The Economic Policy Institute released a report in November of 2000 which found that more than 162,000 federal contract workers, one in every ten, earn less than a living wage of \$8.20 an hour, the amount necessary to lift a family of four above the poverty line.¹⁷⁵ While many other federal workers are paid living wages as a result of prevailing wage statutes, the workers who are earning below poverty level wages constitute 11% of the total 1.4 million federal contract workers in the country.¹⁷⁶ These workers are mostly female, adult, full-time

¹⁷¹ Johnson, *supra* note 19, at A-9.

¹⁷² Federal Living Wage Responsibility Act, H.R. 4353, 106th Cong. (2000).

¹⁷³ See Federal Living Wage Responsibility Act, H.R. 182, 105th Cong. (1997); Federal Living Wage Responsibility Act, H.R. 3463, 104th Cong. (1996). Both bills would have set the living wage at \$7.50 an hour. See H.R. 182, § 3(a); H.R. 3463, § 3(a).

¹⁷⁴ H.R. 4353, § 3.

¹⁷⁵ Brocht, *supra* note 2.

¹⁷⁶ The federal government has required contracts to pay "prevailing wages," which are typically much higher than \$8.20 an hour, as a result of the Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1994 & Supp. V 1999), and the Service Contract Act, 41 U.S.C. §§ 351-358 (1994 & Supp. V 1999). For a description of

workers, and disproportionately minorities. Most of the contractors paying these low wages are defense contractors and other large businesses, not small businesses nor non-profits.¹⁷⁷

Despite the lack of substantive action on the federal level so far, this is an area to watch, as it could provide substantial momentum and information if such legislation is enacted.

IX. OPPOSITION TO LIVING WAGE MOVEMENT: MAXIMUM MINIMUMS¹⁷⁸

Not everyone supports the living wage movement. As in all efforts to legislate reform, there are countervailing forces. Most of the opposition to the living wage movement comes from the same sources that oppose raising, or sometimes even the existence of, the minimum wage.¹⁷⁹ These people often seek to put a legislative maximum on the minimum wage that local communities can set.

Opponents of living wages argue that these ordinances could potentially increase the local poverty rate and cost too much. A survey of over 300 economists conducted in 2000 for the Employment Policies Institute, a non-profit research organization generally opposed to raises in both the minimum wage and the enactment of living wage ordinances, found that nearly eight in ten of the labor economists surveyed thought living wage ordinances would result in employers hiring higher skilled workers, and over 70% said the laws could potentially reduce the number of entry-level jobs and thus increase the local poverty rate.¹⁸⁰ The opposition also suggests that living

the Davis-Bacon Act, see *supra* note 168. The Service Contract Act requires government contracts for the use of service employees over \$25,000 to pay prevailing wages. See 42 U.S.C. § 351.

¹⁷⁷ Brocht, *supra* note 2, at 1.

¹⁷⁸ The title of this section reflects liberties taken from the movie, *Gladiator*. GLADIATOR (Dreamworks Pictures 2001). More information on *Gladiator* may be found on the internet. <http://www.gladiator-thefilm.com> (last visited Apr. 3, 2001).

¹⁷⁹ The best source for information opposing the enactment of living wage ordinances or an increase in minimum wages is the Employment Policies Institute, whose website can be accessed at <http://www.epionline.org> (last visited Apr. 3, 2001).

¹⁸⁰ *Minimum Wage: Survey of Economists Finds Living Wage Laws Reduce Jobs, Promote Hiring of Skilled Workers*, 161 DAILY LAB. REP. (BNA), at A-7

wage ordinances increase the cost of governmental contracts. Pasadena, California, estimated their living wage ordinance cost to be about \$200,000 for the year 2000; Cambridge, Massachusetts, estimated its cost at \$300,000; Madison, Wisconsin, estimated its cost at \$47,000.¹⁸¹ While there is certainly some cost associated with living wages, this article will not join in the aforementioned melee of economists. Others disagree.¹⁸²

A. *The Economic Impact of the Living Wage*

A brief word about the economic impact of living wages. Ever since government was first involved in the setting of minimum wages, there have been controversies about the economic impact of setting wage floors.¹⁸³ It is no different for living wages. The economic impact of the living wage ordinances varies significantly depending on the wage rate and scope of coverage of the ordinance. While an economic analysis is beyond the scope of this article, there are substantial resources available for those seeking more on this phase of the living wage discussion. Living wage proponents point to data that suggests the actual financial impact on covered businesses is very small, less than 1% of the overall spending of these concerns.¹⁸⁴ Opponents disagree, arguing that living wages put

(Aug. 18, 2000) [hereinafter *Minimum Wage*]. The results of the above survey can be viewed at <http://www.epionline.org>.

¹⁸¹ Rick Ruggles, *Pay Law Results Mixed: Three Cities Have Experienced Varying Costs from Living Wage Ordinances Similar to One Proposed in Omaha*, OMAHA WORLD-HERALD, Apr. 17, 2000, at 1, available at 2000 WL 4361493.

¹⁸² Even the *Wall Street Journal* observed that "in recent years, researchers have found little evidence to support that view [that raising minimum wages make small businesses unprofitable and reduce job opportunities for low skill workers]." Waldman, *supra* note 9; see also POLLIN & LUCE, *supra* note 2, at 87-135.

¹⁸³ See *supra* notes 39-103 and accompanying text (discussing historical support for living wages).

¹⁸⁴ Robert Pollin and Stephanie Luce have made the most comprehensive study of the economic impact of living wage ordinances to date and this author directs those interested in an economic analysis of the various types of living wage ordinances to review their excellent book. See POLLIN & LUCE, *supra* note 2.

Pollin and Luce identify and analyze the economic impact of three types of living wage ordinances. *Id.* at 16-19, 87-135. The first category includes ordinances like that enacted by Milwaukee, which demands all public contractors with service contracts over \$5,000 to pay a wage sufficient to support a family at the

too big a burden on business and actually harm the cause of the working poor by making entry-level employment less available.¹⁸⁵ These economic issues will continue to be debated as long as there are opportunities to do so.

B. The "Maximum Minimum" Effort

The most successful method used by opponents of living wage ordinances has been to ask state legislatures to ban local jurisdictions from enacting a living wage that mandates a minimum higher than the state minimum wage.¹⁸⁶

The most recent example of the "maximum minimum" effort occurred in February, 2001, when Utah passed a state law prohibiting local governments from setting a minimum wage higher than the state minimum wage of \$5.15 an hour.¹⁸⁷ The main proponent of the legislation argued that the maximum minimum wage bill was "one of the most family-friendly pieces of legislation we have passed this session."¹⁸⁸ He argued that the ban on higher municipal minimum wages will make it easier "for young people and people who have just entered this country" to find entry-level work.¹⁸⁹ He stated further that "[w]e should not allow municipalities to arbitrarily

national poverty line which rises as that line is adjusted. *Id.* The second category includes ordinances like that passed by Los Angeles, which sets a higher wage and demands health benefits and other benefits, but applies only to higher thresholds of contracts. *Id.* The third category is based on efforts (so far unsuccessful) like those launched in Denver, Houston and New Orleans to enact a uniform city-wide wage which is not nearly as high as those that many cities have enacted but would apply to all workers in the city, not just those working for public contractors. *Id.* Pollin and Luce conclude that there is a significant economic impact in these ordinances, but that the wage and benefit increases amount to less than 1% of the total spending of the covered businesses. *Id.*

¹⁸⁵ *Minimum Wage*, *supra* note 179, at A-7. The results of the survey, *The Living Wage: Survey of Labor Economists*, can be viewed at the website for the Employment Policies Institute. EMPLOYMENT POLICIES INSTITUTE, THE LIVING WAGE: SURVEY OF LABOR ECONOMISTS, at http://www.epionline.org/livingwage_survey.htm (last visited Mar. 31, 2001).

¹⁸⁶ Minimum wages in all fifty states are listed in the prior section. *See supra* text pp. 968-70.

¹⁸⁷ Tripp Baltz, *State Laws: Utah Measures on Pay Deductions, Local Minimum Wage Go to Governor*, 41 DAILY LAB. REP. (BNA), at A-8 (Mar. 1, 2001).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

set a wage that denies entry to those trying to get a foothold" in the job market.¹⁹⁰

Several other legislatures have considered such state-wide maximum minimums. Just as New Orleans was facing a living wage ballot initiative, the Louisiana Legislature banned local living wage laws higher than the state minimum.¹⁹¹ Michigan is trying to do the same.¹⁹² Arizona, Kansas, Michigan and Louisiana have considered state laws prohibiting living wages, but as of July 1, 2000, only Louisiana's law has passed.¹⁹³ The Arizona Legislature turned back an attempt in April of 2000 to impose a state maximum minimum, which could have imperiled Tucson's living wage ordinance.¹⁹⁴ Criticisms by the business community included the increased cost to public entities like the Tucson convention center.¹⁹⁵

C. Other Methods of Opposition

Other methods of opposition have also been tried. A traditional expression of opposition to living wage ordinances is litigation. A lawsuit was filed late 2000 in United States District Court for the Northern District of California seeking an injunction to halt the San Francisco living wage ordinance. The plaintiff, a restaurant that is part of a national chain, charges

¹⁹⁰ *Id.* Stephenson told the Bureau of National Affairs that the minimum wage bill is "one of the most family-friendly pieces of legislation we have passed this session." *Id.* He said the ban on higher municipal minimum wages will make it easier "for young people and people who have just entered this country" to find entry-level work. *Id.* Opponents of the bill have characterized local minimum wages as a way for cities and towns to enact a "living wage." *Id.* Stephenson has said the state should work for a fair "entry-level wage." *Id.* "We should not allow municipalities to arbitrarily set a wage that denies entry to those trying to get a foothold" in the job market, he added. *Id.*

¹⁹¹ The Louisiana Legislature enacted section 23:642 of the Louisiana Revised Statutes Annotated, which attempted to pre-empt any local government from enacting a local minimum wage. The validity of the state attempt to prevent local minimum wages will not be determined until after voters have a chance to pass the bill. See *Johnson v. Carter*, 767 So. 2d 790, 791-92 (La. Ct. App. 2000).

¹⁹² Michigan was considering similar legislation prohibiting local living wage ordinances as this article was being presented. See *Senate to Consider Living Wage Requirement*, DETROIT NEWS, Feb. 2, 2001, at 6.

¹⁹³ Hirschman, *supra* note 5.

¹⁹⁴ *Tucson Living Wage*, *supra* note 153.

¹⁹⁵ See Carlisle, *supra* note 144, at A-9.

that the ordinance pre-empts state and federal laws and is unfair because it applies only to certain businesses. The city argues that the statute applies to an area subject to city restrictions on development which have resulted in businesses enjoying a monopoly position with hefty profits.¹⁹⁶ No decision was available at the time this article was finalized but the author is dubious of the chances of success of the challenge. Another method, so far unsuccessful, of opposing living wages is for opponents to offer their own non-living wage ballot initiative.¹⁹⁷

State legislative efforts to impose maximum minimums on local jurisdictions appear to be the most effective legal tool of the opponents of living wage ordinances.

X. FUTURE ISSUES FOR THE LIVING WAGE MOVEMENT

It takes nothing away from the accomplishments of the living wage movement to point out the limitations of current enactments and the areas where improvements are needed. The challenge is to make these laws more generous and more encompassing.

Legislation is difficult and compromise is often necessary in the beginning. But there are indications that the compromises necessary to pass the living wage legislation have in some cases watered them down so much that they are not having significant impact.¹⁹⁸ According to one living wage proponent, the usual impact of a living wage ordinance is on less than 1%

¹⁹⁶ See Henry K. Lee, *Berkeley Sued by Restaurant: Living Wage Law's Extension Challenged*, S.F. CHRON., Oct. 21, 2000, at A17, available at 2000 WL 6494739; *Restaurant Files Suit to Block Living Wage Ordinance*, NATION'S RESTAURANT NEWS, Nov. 6, 2000, at 14, available at 2000 WL 29346565.

¹⁹⁷ In late 2000, Santa Monica citizens defeated what was described by opponents as a "fake living wage proposal" backed by the hotel industry. Tom Gilroy, *Health Insurance: Living Wage Bid Backed by Hotel Industry Soundly Defeated in California Coastal City*, 26 PENS. & BEN. REP. (BNA), at 2840 (Nov. 21, 2000). The measure would have prohibited local government from ever setting wages or benefits for employees within Santa Monica. *Id.*

¹⁹⁸ Ruggles & Goodsell, *supra* note 145, at 1. When asked to evaluate the effect of the Madison, Wisconsin, living wage ordinance, one opponent, the president of the local Chamber of Commerce, said "[i]t was watered down enough so that there haven't been any major complaints." *Id.*

of a city's total workforce.¹⁹⁹ Some ordinances have even less impact.²⁰⁰ The very generous Berkeley ordinance was estimated to apply to only fifty-six workers.²⁰¹ While the limited coverage is understandable in the initial phase of this new part of the living wage movement, the future of the living wage movement will be evaluated by tracking not only how many jurisdictions it expands to, but also how much it increases the coverage of living wage mandates to give relief to more and more workers.

Thus, one of the areas of needed growth in the living wage movement is to expand the scope of workers covered by these laws. Jurisdictions could amend and apply their laws more broadly to contracts with smaller threshold amounts. The Baltimore ordinance which covers all municipal contracts over \$5000 has broader impact on low-wage workers than the ordinance of Boston which only applies to contracts over \$100,000.²⁰² In Buffalo, citizens complained that their local living wage, enacted in August of 1999, was not being enforced a year later because of questions about which employees were covered.²⁰³ The law as proposed had a \$5000 contract threshold but was amended in passage to apply to a \$50,000 contract threshold.²⁰⁴ Jurisdictions which limit the types of workers covered could expand their coverage. For example, the fair

¹⁹⁹ According to Chauna Brocht of the Economic Policy Institute, the narrowly drawn living wage ordinances usually apply to less than 1% of a city's total workforce. Hirschman, *supra* note 5, at 3435. "The Los Angeles ordinance, for example, covers only about 7000 workers out of a total workforce of 1.8 million." *Id.*

The Alexandria, Virginia, living wage ordinance, passed June 17, 2000, was expected to affect about 150 to 200 workers. *City of Alexandria*, *supra* note 137, at A-6. *But see* Don Finefrock, *Living Wage is Approved for Dade*, MIAMI HERALD, May 12, 1999, at 1B (estimating the Miami living wage ordinance will raise salaries of 1760 full and part-time employees).

²⁰⁰ *Portland Ordinance*, *supra* note 146, at A-6. Portland's Fair Wage policy required living wages to be paid to companies that contract with the city for janitors, security guards and parking lot attendants. *Id.* The city estimated that only about 100 such workers would directly benefit. *Id.*

²⁰¹ *See Lee*, *supra* note 195.

²⁰² *See EPI Plans and Proposals*, *supra* note 163.

²⁰³ Fred O. Williams, *City's 'Living Wage' Law Languishes Year After Passage*, BUFFALO NEWS, July 21, 2000, at B6.

²⁰⁴ *Id.*

wage policy in effect in Portland, Oregon, restricts coverage to city contractors who hire janitors, security guards and parking lot attendants.²⁰⁵ This and similar ordinances could be amended to apply to many more workers and expand their coverage.

Jurisdictions could also expand the coverage of living wage ordinances beyond local contractors to other financial instruments of the government like grantees, licensees, lessees and those receiving tax credits or special zoning relief, as a few cities do in their laws.²⁰⁶ Cleveland applies their living wage law to recipients of contracts and subsidies worth at least \$75,000.²⁰⁷ Duluth applies their living wage law to companies receiving over \$25,000 in economic assistance.²⁰⁸ Berkeley extended their living wage law to cover all businesses in the city's public marina area with annual gross sales of \$350,000 and at least six employees, arguing that these businesses are made possible by public funds.²⁰⁹ The Santa Monica City Council is considering a proposal which would require hotels, restaurants and other businesses with fifty or more employees, which are located in a designated coastal zone, to pay living wages and benefits.²¹⁰

Jurisdictions could require all businesses, even those without public contracts, within the jurisdiction to be subject to a living wage ordinance, like a ballot proposition pending before the voters of the City of New Orleans. In New Orleans, ACORN and the AFL-CIO are pushing a 2002 ballot initiative to establish a city-wide minimum wage one dollar above the federal minimum wage.²¹¹ Though the wage amount proposed for New Orleans is significantly lower than most living wage ordi-

²⁰⁵ See *supra* note 199 and accompanying text.

²⁰⁶ See *supra* discussion, pp. 964-67.

²⁰⁷ See EPI Plans and Proposals, *supra* note 163.

²⁰⁸ *Id.*

²⁰⁹ See Lee, *supra* note 195. Berkeley also extended their living wage law to businesses leasing city land which have annual gross receipts over \$250,000. See EPI Plans and Proposals, *supra* note 163.

²¹⁰ This proposal would require these business to pay a minimum wage of \$10.69 an hour plus full health care benefits and twenty-four paid days off. See Hirschman, *supra* note 5.

²¹¹ Grace, *supra* note 1, at 1.

nances, the scope of the proposal is broader and would apply to most all businesses in the city, not just those with city contracts. The ballot initiative came about over the objection of the New Orleans City Council and the Louisiana Legislature and only after years of work by ACORN including several trips through the Louisiana legal system.²¹² The economic impact of the proposed raise has been estimated at \$71 million dollars in increased wages, but it will be broadly diffused through over 12,000 businesses and the city government.²¹³ Efforts to extend living wages to private employees are also being considered in Baltimore and Knoxville.²¹⁴

The living wage movement will also have to struggle with a defensive effort to keep states from enacting laws prohibiting local living wage ordinances. These maximum minimums have passed in Louisiana²¹⁵ and Utah.²¹⁶ Similar efforts, so far

²¹² In New Orleans, a voter initiative for an election to change the city charter must be initiated by the submission of the signatures of 10,000 registered voters. See *Davis v. Carter*, 671 So. 2d 1147, 1148 (La. Ct. App. 1996). ACORN had to do this two separate times as the New Orleans City Council refused to put the matter on the ballot. *Davis*, 671 So. 2d at 1148-49. The first refusal by the Council was a discretionary technical decision that refused to certify the initiative because all of the signatures were not turned in on the same day. *Id.* at 1149. That use of their discretion was upheld by the courts in *Davis*. ACORN then did another signature drive in 1996 and turned in over 25,000 signatures on the same day. This time the City Council demurred saying that they were not sure that they had the authority to allow the minimum wage to be raised. ACORN went back to court to compel the Council to place the initiative on the ballot. During the litigation, described in *Johnson v. Carter*, 707 So. 2d 1366 (La. Ct. App. 1998), the Louisiana Legislature enacted section 23:642 of the Louisiana Revised Statute Annotated, which attempted to pre-empt any local government from enacting a local minimum wage. *Id.* at 1366-76; see *supra* note 191 and accompanying text. ACORN had to then go back to court and ultimately prevailed in 2000, allowing the matter to go on the ballot in early 2002. *Johnson*, 767 So. 2d at 797.

²¹³ Estimated gains to low-wage workers and the local economy will offset anticipated weak negative effects of modest displacement of workers and business relocation. See Robert Pollin et al., *Intended vs. Unintended Consequences: Evaluating the New Orleans Wage Proposal*, Presentation Before the ASSA Conference During the January Meeting of the Industrial Relations Research Association (Jan. 2001). For a copy of the paper, contact Stephanie Luce, University of Massachusetts, Labor Relations and Research Center, sluce@econs.umass.edu.

²¹⁴ See *supra* note 163.

²¹⁵ See *supra* note 191 and accompanying text.

²¹⁶ See *supra* note 187 and accompanying text.

unsuccessful, have been launched in Michigan.²¹⁷ Arizona, Kansas, Michigan and Louisiana have considered state laws prohibiting living wages, but as of July 1, 2000, only Louisiana's law was successful.²¹⁸

A final challenge for the living wage movement is to enact real living wage rates: that is, rates that allow workers to be self supporting. That means hourly living wage rates of over \$6, \$7 or even \$8 an hour. As a previous section on calculation of living wages showed, workers really need wages in the range of \$10 an hour and up to begin to move off of government assistance like food stamps and become self-sufficient.²¹⁹

Obviously, as the movement seeks to expand the coverage of living wage ordinances and to increase the amount of the hourly wages, opposition to the movement will increase as well. Because living wage ordinances have usually limited coverage to workers employed by local governments and public contractors, they have so far avoided more bitter political opposition from business groups.²²⁰

The future of the living wage movement is bound up in part with the economy. How the economy does and what evidence comes in on the effect of these relatively new laws will help determine the future of the living wage movement. As the *Wall Street Journal* observed, "[i]f they prove successful at helping the working poor escape poverty, with relatively little harm to local economies, living wages are probably here to stay."²²¹

It is much easier to list challenges than to overcome them, but the living wage movement has had such a series of significant successes in recent years that it clearly appears to be strong enough to address these future issues.

²¹⁷ See *supra* note 191 and accompanying text.

²¹⁸ See Hirschman, *supra* note 192.

²¹⁹ See discussion *supra* pp. 954-64.

²²⁰ Waldman, *supra* note 9.

²²¹ *Id.*

CONCLUSION

There is a reason that advocacy for living wages has been going on for over one hundred years—it is very tough work. However, recent victories have provided a surge of energy and enthusiasm for those who support the rights of self-sufficiency for all workers. The challenge is to sustain that momentum and to substantially increase the numbers of workers who are entitled by law to earn living wages. For the foreseeable future, the only real opportunity to implement a living wage—a wage sufficient for workers to support their families—lies on the local level in the tireless efforts of the living wage movement.

STATE LAW AND THE STRUGGLE FOR A LIVING WAGE AT THE UNIVERSITY OF MISSISSIPPI

*Larry S. Bush**

Beginning in the fall semester of 2000, a loosely-organized living wage campaign took shape on the campus of the University of Mississippi. The goal of the campaign is to obtain a "living wage" and decent working conditions for people who work on campus—both those employed directly by the University and the many others employed by private entities, such as fraternities, sororities and contractors.¹

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¹ Entry level wages in the 2001 fiscal year for custodians at the University of Mississippi were \$6.82 per hour (\$14,189 annual salary); many other positions (including many workers in student housing, as well as a number of clerks and secretaries) were even lower. Persons employed by fraternity and sorority houses on campus (the land is owned by the University and leased to the organizations at a nominal rate), as well as by the private contractor that runs the cafeterias on campus, fare even worse. The University employees have retirement and health insurance benefits. Many of the private employees on campus are paid at or near minimum wage (\$5.15 an hour), and receive no insurance or other benefits.

The 2001 Federal Poverty Guidelines, prepared by the U.S. Department of Health and Human Services, indicate that a family of four with an annual income under \$17,650 is living in poverty. OFFICE OF THE ASSISTANT SECY FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE 2001 HHS POVERTY GUIDELINES, at <http://aspe.hhs.gov/poverty/01poverty.htm> (last updated Jan. 7, 2002). Even these figures do not accurately reflect the actual costs of living, and other federally-supported assistance programs reflect the consensus that higher levels are a more realistic measure. For instance, the Childrens' Health Insurance Program (CHIP) covers families whose annual income is twice the poverty guidelines. For a detailed assessment of the cost of living in Oxford, Mississippi, in 2001, see John D. Shaw, *What's In a Wage? The Living Wage Movement and the Effect of a Living Wage on a Minimum Wage Family*, 70 MISS. L.J. 1037 (2001).

As of this writing, the campaign has engaged in public meetings and information-gathering, but has not yet made any formal proposals to the University administration. One reason for this is that, with a few exceptions, the workers themselves have to date been unwilling or unable to participate in the campaign. Those who have taken part are adamant, however, that there is broad support for it among the ranks of the affected workers. Some workers and retired workers explained that many others are afraid to speak out and get involved.²

The people who have united to support this cause come from the student body, the faculty and staff, as well as members of the local community.³ Many of the participants are inspired by their religious beliefs; others have more secular perspectives. Based upon the experience of other living wage campaigns across the country, however, the University of Mississippi initiative currently lacks a crucial ingredient—organized labor.⁴ Its absence goes a long way toward explaining the reluctance of employees to become involved.

There is general agreement among the campaign activists that participation by a significant number of the affected

² At a public meeting held December 7, 2000, William Buford, a retired University of Mississippi employee and current head of the NAACP chapter in Lafayette County, Mississippi, said this about employee attitudes during his forty years at the University: "The employees just didn't want to speak out." He went on: "I still sense that same situation, that employees are scared to speak out. The person that stood up and spoke out was always threatened." Pam Hamilton, *UM Staff Afraid to Speak Out*, DAILY MISSISSIPPIAN, Dec. 8, 2000, at 1, available at http://www.thedmonline.com/vnews/display.v/ART/2000/12/08/3aaa60b14?in_archive=1. Edna Dickens, a senior custodian at the University in December 2000, who has since retired, said: "They're afraid that they're going to lose their jobs Some are afraid to come; some are lazy. They're just sitting back and watching." *Id.*

³ The author was included among them prior to his retirement and relocation in 2002.

⁴ See generally Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245 (1995) (urging an alliance among the labor movement, poor people's advocacy groups and Legal Services bar); William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139 (Summer 1998) (arguing that inherent in the Constitution's guarantee of liberty is the right of every working individual to be paid a living wage);

workers is crucial to success. The workers ultimately must be the ones to decide exactly what salary levels and other conditions will be sought. Furthermore, even though students, faculty and community members can press the campaign's demands publicly, with relatively little concern about retaliation or other negative consequences, unless a core of workers is willing to publicly support the campaign, there is less chance of it being taken seriously.

This article will discuss the ways in which current Mississippi employment law contributes to a culture of insecurity among University of Mississippi low-wage employees. Nevertheless, the article also discusses how some aspects of the law could be applied to protect their rights as individuals to speak out about working conditions on campus.⁵ Part I describes the employment-at-will doctrine in Mississippi and its implementation in the University environment. Part II explores state common law and statutory exceptions to the employment-at-will regime and suggests ways that existing or potential doctrines could be invoked on behalf of University employees who experienced retaliation in connection with living wage campaign activity.

⁵ The plight of privately-employed workers on campus is generally worse than that of the state employees working beside them. See *supra* note 1. Their legal status is not addressed directly in this article. Many of the state common law principles discussed herein, however, are applicable to them as well.

A number of other pertinent sources of relevant law that could bear on a living wage campaign are beyond the scope of this article. It does not deal with U.S. Constitutional protections under the First and Fourteenth Amendments. Nor does it address the extent to which the law would protect—or prohibit—efforts by Mississippi public university employees to form and join labor organizations, to bargain collectively or to take other concerted action for mutual aid and protection (i.e., to engage in demonstrations, work stoppages or other industrial actions). Interested readers could consult Richard Compere, Comment, *Public Sector Collective Bargaining in Mississippi: An Argument for Acceptance*, 56 MISS. L.J. 379 (1986). There has been little change in Mississippi law since this comment was written, but the extent to which there are spaces in which public employee unions could operate within existing law was not addressed in the article.

I. EMPLOYMENT-AT-WILL AND ITS IMPACT ON PUBLIC UNIVERSITY EMPLOYEES

Any examination of the law's impact on employment relationships must begin with the "employment-at-will" rule. In Mississippi, as in all of its sister states except Montana,⁶ absent a statutory prohibition or a judicially-created exception, the rule is:

[A] contract of employment for an indefinite term may be terminated at the will of either party. The employee can quit at will; the employer can terminate at will. This means either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.⁷

Like so much of nineteenth century jurisprudence,⁸ the

⁶ Montana is unlike all other jurisdictions with regard to at-will employment. Although the Montana Code did, in fact, initially state that employment at will was its default rule "[a]n employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter" MONT. CODE ANN. § 39-2-503 (2000)), it subsequently modified this provision through its enactment of section 39-2-904 which states that "wrongful discharge" occurs when

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (b) *the discharge was not for good cause* and the employee had completed the employer's probationary period of employment; or (c) the employer violated the express provisions of its own written personnel policy.

MONT. CODE ANN. § 39-2-904 (2001) (emphasis added). In the case of *Whidden v. John S. Nerison, Inc.*, 981 P.2d 271 (1998), the Supreme Court of Montana held that because section 503 and section 904 of the Montana Code were clearly in conflict with one another, section 904 had effectively eliminated the at-will employment provisions and thus impliedly repealed section 503. *Whidden*, 981 P.2d at 274-75.

⁷ *Kelly v. Miss. Valley Gas Co.*, 397 So. 2d 874, 874-75 (Miss. 1981).

⁸ In his treatise pertaining to the law of master and servant relations, Professor Horace Wood stated that

a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish its proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

right of employers arbitrarily to discharge workers for reasons unrelated to their ability to perform their jobs was defended in large part on mutuality principles beginning, ironically, with the specter of workers trapped in jobs against their will. Given this indefensible, and arguably unconstitutional,⁹ outcome, so

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1872). In his writings, Professor Wood coined this doctrine "the American Rule" and contrasted it with the English presumption that all work was to be for a fixed duration. *Id.* Twentieth century legal scholars have both heralded and duly criticized Professor Wood for his rule. See Mayer G. Freed and Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 558 (1990) (defending Professor Wood's proposition, stating that employment at will was "the natural offspring of a capitalist economic order, reflecting the value of individualism, the growth of competition and the mobility of labor."); cf. Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967) (the seminal article arguing for a change in the employment-at-will doctrine); Clyde W. Summers, *The Rights of Individual Workers: The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1085 (1984) (criticizing Wood's Rule as being without "legitimate parentage," Summers stated that employment at will had "effect of stripping most workers of the legal protection of a contract of employment.").

⁹ The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States." U.S. CONST. amend XIII. The Supreme Court extended this prohibition to private employment contracts in the landmark case of *Bailey v. Alabama*, 219 U.S. 219 (1911). There the majority stated that "[a] peon is one who is compelled to work for his creditor until his debt is paid." *Bailey*, 219 U.S. at 242. It continued,

peonage, *however created*, is compulsory service, involuntary servitude. . . . The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

Id. at 243-44 (emphasis added). The Court narrowed this holding severely in the more recent case of *United States v. Kozminski*, 487 U.S. 931 (1988). The Court, in ordering a new trial to determine whether the employer of two retarded employees was violating the Thirteenth Amendment, held that "for purposes of criminal prosecution . . . 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *Kozminski*, 487 U.S. at 952 (holding that servitude existed where employees were not physically prevented from leaving). *But see* *United States v. Warren*, 772 F.2d 827, 833 (11th Cir. 1985) (finding employers in violation of Thirteenth Amendment where employees were threatened with violence if they attempted to leave).

the argument went the worker must be free to walk away from an open-ended employment relationship. That being so, even-handed application of the law ("mutuality") demanded that the employer have the same freedom. While twentieth century sensibilities came to recognize that formal legal equality did not reflect the realities of unequal distribution of economic power that exist in the workplace, this realism did not affect the common law until quite recently. Furthermore, neither statute nor jurisprudence has yet replaced employment at will as the starting point for the American legal system.¹⁰

In Mississippi, public as well as private employment relationships are governed by the employment-at-will rule, unless otherwise modified by statute or contract.¹¹ Public employers are creatures of state law, however, and are subject to whatever constitutional or statutory requirements are placed on their ability to employ and discharge a workforce. Mississippi's eight public universities are under "the management and control" of the Board of Trustees of State Institutions of Higher Learning (IHL Board).¹² The statutory authority for the IHL Board's employment practices is written in terms that suggest, but do not require, a regime of definite-term contracts, rather than pure employment at will.¹³

¹⁰ The United States is unlike western European countries in this regard. For a review of European statutory protections for both the employee and the employer against termination at will by the other, see Benjamin Aaron, *Employees' Duty of Loyalty: Introduction and Overview*, 20 COMP. LAB. L. & POL'Y J. 143 (1999) (presenting overview of statutory principles of Italy, Germany, France and England pertaining to duties owed by both employer and employee to one another). See also Frances Raday, *Individual and Collective Dismissal - A Job Security Dichotomy*, 10 COMP. LAB. L.J. 121, 123-37 (1989) (comparing American rule of employment at will with European model of job security).

¹¹ See *Wicks v. Miss. Valley State Univ.*, 536 So. 2d 20, 23 (Miss. 1988) (holding university could deny tenure "for no reason, a reason based on erroneous facts, or for any reason it chose, except for a reason that violated plaintiff's constitutional rights.").

¹² MISS. CODE ANN. § 37-101-1 (2001).

¹³ § 37-101-15(f):

The board shall have the power and authority to elect the heads of the various institutions of higher learning and to contract with all deans, professors, and other members of the teaching staff, and all administrative employees of said institutions for a term of not exceeding four (4) years. The board shall have the power and authority to terminate any

The IHL Board has adopted "policies and bylaws" to implement the authority given to it by statute.¹⁴ Insofar as employment matters are concerned, nowhere in those policies is employment at will mandated for any class of university employees. In fact, at one point, the IHL Board's policy, somewhat cryptically, states that "[a]lthough the law does not empower the Board to contract for indefinite periods," the Board can authorize continuing employment policies¹⁵—a declaration that suggests a level of employment security that is the antithesis of employment at will.¹⁶ Hiring authority is delegated in certain instances to the Commissioner of Higher Education or to "institutional executive officers" (i.e., university presidents, or in the case of the University of Mississippi, its chancellor)¹⁷ and the institutions are required to have "written employment and/or hiring procedures for both faculty and staff."¹⁸ The university presidents can authorize definite-term contracts of up to twelve months' duration without IHL Board approval.¹⁹

Notwithstanding the option available under statutory and

such contract at any time for malfeasance, inefficiency, or contumacious conduct, but never for political reasons. It shall be the policy of the board to permit the executive head of each institution to nominate for election by the board all subordinate employees of the institution over which he presides. It shall be the policy of the board to elect all officials for a definite tenure of service and to reelect during the period of satisfactory service. The board shall have the power to make any adjustments it thinks necessary between the various departments and schools of any institution or between the different institutions.

Id.; cf. *Montgomery v. Boshears*, 698 F.2d 739, 742 (5th Cir. 1983) (finding non-renewal of a one-year term university employee contract is not a deprivation of a constitutionally protected property interest).

¹⁴ BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER LEARNING, STATE OF MISSISSIPPI, POLICIES AND BYLAWS, <http://www.ihl.state.ms.us/admin/downloads/policiesandbylaws.pdf> (amended through Aug. 9, 2001) [hereinafter BOARD OF TRUSTEES POLICIES AND BYLAWS].

¹⁵ *Id.* § 401.01.

¹⁶ The IHL Board, however, operates within a custom and practice in which employment-at-will is the background rule. Telephone Interview with Mary Ann Connell, University of Mississippi attorney (Apr. 4, 2001).

¹⁷ Cf. *Bruner v. Univ. of S. Miss.*, 501 So. 2d 1113, 1115 (Miss. 1987) (stating only way to create valid university contract is by IHL Board approval of school president's nomination).

¹⁸ BOARD OF TRUSTEES POLICIES AND BYLAWS, *supra* note 14, § 801.05.

¹⁹ *Id.* § 707.02.

IHL Board policies to choose more secure forms of employment contracts, decision-makers at the University of Mississippi have recently elected to declare, in the strongest and most prominent way imaginable—on the first page of the faculty and staff handbook—that the default rule on this campus is employment at will:

EMPLOYMENT-AT-WILL STATEMENT

Employment at the University of Mississippi is “at will” and terminable “at will” by the University or staff member with or without cause. Any oral or written statements or promises to the contrary, other than contracts issued by the Board of Trustees of State Institutions of Higher Learning, are not binding upon the University. Should any such statement be made suggesting that employment at this University is other than “at will,” the employee should contact the Department of Human Resources for confirmation.

HANDBOOK DISCLAIMER

The University of Mississippi reserves the right to alter or amend any policies contained in *A Handbook for Faculty and Staff* at any time without notice. These policies are intended only to be guidelines for employment at the University of Mississippi and do not give rise to any contractual rights. Official copies of *A Handbook for Faculty and Staff* are placed in the Offices of the Chancellor, Department of Human Resources, and the J.D. Williams Library.²⁰

Faculty and some staff members have definite term contracts “issued by” the IHL Board (although the actual document is signed by the chancellor as their agent) and are therefore in the excepted category alluded to by the policy. Other employees, however, do not receive an annual contract, but merely a memorandum from the chancellor telling them what

²⁰ UNIV. OF MISS. HUMAN RES., A HANDBOOK FOR FACULTY AND STAFF, <http://www.olemiss.edu/depts/HR/handbook/employatwill.html> (last visited Jan. 21, 2002). This statement appeared for the first time in the handbook in 1998. In the interest of full disclosure, it should be pointed out that this provision resulted from a recommendation of a university committee formed in early 1998. The author was originally a member of that committee, but was away from the University on sabbatical during the Fall semester when this statement was adopted. For a discussion of the legal significance of the handbook disclaimer, see *infra*, Part II.C.

salary rate the IHL Board approved for their "position," a document clearly drawn so as to fall within the employment-at-will terms of the policy. Thus, unbeknownst to many University employees (who often believe that they have their jobs for the length of the fiscal year, at a minimum), their employment could be terminated at a moment's notice for any reason and, to the extent that the University's policy does not run afoul of other legal restrictions, without any legal recourse.

II. EXCEPTIONS TO THE EMPLOYMENT-AT-WILL RULE THAT MIGHT APPLY TO ADVERSE PERSONNEL ACTIONS MOTIVATED BY ANIMUS TOWARD LIVING WAGE CAMPAIGN ACTIVITY²¹

A. *Mississippi Common Law "Public Policy" Torts*

Along with virtually every other jurisdiction in the United States,²² the Mississippi Supreme Court has begun to create common law exceptions to address some of the harsher aspects

²¹ There are many federal anti-discrimination statutes that Congress intended to apply to public university employees, for example, the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219 (1994 & Supp. V 1999); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994 & Supp. V 1999); the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1994 & Supp. V 1999); and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (1994 & Supp. V 1999). These are beyond the scope of this article. Given the fact that the state university in question herein has expressly sought to limit the state-based legal rights of its employees, however, it is ironic to note the recent work of the United States Supreme Court, disempowering state workers under a number of these statutes, by stripping them of the ability to exercise the rights that Congress gave them. See generally *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that the legislative record of the ADA failed to show that Congress identified pattern of state discrimination against the disabled in employment, and thus did not support abrogation of the states' Eleventh Amendment immunity from suits for money damages under Title I of the ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000) (holding that the ADEA did not validly abrogate states' Eleventh Amendment immunity from suit by private individuals); *Alden v. Maine*, 527 U.S. 706, 755-56 (1999) (holding that Congress could not abrogate state sovereign immunity and subject Maine to suit for alleged FLSA violations of overtime provisions unless Maine first consented to be sued).

²² As of 1994, all but six states had adopted some form of the public policy exception to the general default rule of employment at will. MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 9.9 (1994).

of employment at will. In 1993, in *McArn v. Allied Bruce-Terminix Co.*,²³ it held that "there [is] in at least two circumstances, a narrow public policy exception to the employment at will doctrine and this [is] so whether there is a written contract or not," as well as "where there is 'privately made law' [i.e., the employment contract] governing the employment relationship."²⁴ The "two circumstances" for which *McArn* created a tort cause of action are when an employee was discharged (a) because she "refuses to participate in an illegal act" or (b) because he "report[s] illegal acts of his employer to the employer or anyone else."²⁵

In 1996, in *Willard v. Paracelsus Health Care Corp.*,²⁶ the Mississippi Supreme Court held that a person with a *McArn* claim "is entitled to pursue all remedies available in tort, including punitive damages."²⁷ Three years later, following trial on remand, the court sustained a jury verdict of three million dollars for the two discharged employee-plaintiffs in *Paracelsus Health Care Corp. v. Willard*.²⁸

Crucially, it seems that the "illegal act" envisioned under *McArn* and *Willard* I and II is not limited to violations of criminal law. *McArn* speaks broadly of "deceptive, fraudulent or illegal actions."²⁹ *Willard* I describes the "illegal act" as being "forgery and financial irregularities," without bothering to cite any criminal statutes that might have been violated.³⁰ Although it remains to be seen exactly what the parameters of "illegal act" might be in Mississippi, jurisprudence from other states suggests that this category of "public policy exception" could potentially include a wide range of acts that public policy has condemned.³¹

²³ 626 So. 2d 603 (Miss. 1993).

²⁴ *McArn*, 626 So. 2d at 607.

²⁵ *Id.*

²⁶ 681 So. 2d 539 (Miss. 1996) [hereinafter *Willard* I].

²⁷ *Willard* I, 681 So. 2d at 542. The *Willard* I opinion also recognized a claim for "tortious breach of contract." See *infra* notes 36, 32, 58 and 76 and accompanying text. Punitive damages could not be obtained in a tort action against a public university, however. MISS. CODE ANN. § 11-46-15(3) (2000).

²⁸ 754 So. 2d 437 (Miss. 1999) [hereinafter *Willard* II].

²⁹ *McArn*, 626 So. 2d at 607.

³⁰ *Willard* I, 681 So. 2d at 542.

³¹ Other jurisdictions have expanded the notion of public policy beyond simply

Another important aspect of *McArn* is the apparent requirement that the "illegal act" must be one that "affects third parties among the general public, though they are not parties to the lawsuit."³² Insofar as this doctrine might be applicable to public university employers, it would be possible to argue that any violation of public policy serious enough to constitute an "illegal act," would, if committed by a university official, give rise to the requisite level of harm to the general public, and thus satisfy this requirement. It may well be that such an argument would not be necessary, however, given the facts in *Willard I* (and *II*). There, the "forgery and financial irregularities" were perpetrated by a supervisor against the private employer itself.³³ Nonetheless, the court did not find occasion to identify any separate—necessarily indirect—harm to third parties or the general public in the course of recognizing that a cause of action existed.

In the context of the living wage campaign at the University of Mississippi, what sorts of "illegal acts" might give rise to a *McArn* claim? Purely hypothetically, discharging a low-level supervisor for refusing to intimidate workers into silence on a matter of public interest as to which they had a legal right to speak out or for exercising other protected rights of association

violations of criminal law. See, e.g., *Green v. Ralee Eng'g Co.*, 960 P.2d 1046, 1058 (Cal. 1998) (broadening scope of public policy exception to include administrative laws which represent fundamental public policy (i.e., airline safety) even though those regulations did not specifically apply to employer); *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1995) (finding clear public policy exception to employment-at-will rule where employee, precluded from filing sexual harassment suit under state discrimination laws because her employer had fewer than four employees, wished to pursue a tort claim for wrongful discharge). See also *Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144 (Md. App. 1990), where the court held even absent specific prohibition against such termination,

that the constitutionally protected right of privacy, the right to be free of others' snooping, spying, rummaging, or searching through one's personal and private papers is such a fundamental right that no employer may require an employee to violate it as a condition of employment. Consequently, firing an employee for refusing to commit such a wrongful act ought to be and is in contravention of a clear mandate of public policy.

Kessler, 572 A.2d at 1151.

³² *McArn*, 626 So. 2d at 607.

³³ *Willard I*, 681 So. 2d at 542.

arguably would support such a claim.³⁴

One important final point remains regarding the *McArn* doctrine. The court's emphasis that there were "at least two circumstances" in which a public policy tort would be recognized in Mississippi is a clear suggestion that, given appropriate facts, the court would be prepared to broaden this category to include variations of the public policy tort theory that have evolved in other jurisdictions. These include, for example, claims that an employer's discharge was in retaliation for a worker's performance of a duty encouraged by public policy, like serving on a jury,³⁵ or in retaliation for a worker exercising a right conferred on her as a matter of public policy.³⁶ Thus, it is conceivable that a public university worker discharged because she had joined or been active in a labor organization³⁷ could maintain a tort claim under an extension of *McArn*.

Whatever the theory of recovery in tort might be, lawsuits against the University by its employees would be subject to the requirements of Mississippi's sovereign immunity statutes. Although immunity has been waived for many tort claims,³⁸ the statutory scheme provides the exclusive remedy.³⁹ The amount of recovery available is also limited significantly.⁴⁰

³⁴ Cf. HOWARD A. SPECTER & MATTHEW W. FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* § 10.35 (1989).

³⁵ See, e.g., *Wall v. Wassau Ins. Co.*, 12 Conn. L. Rptr. 335 (1994) (holding partial remedy of payment of ten weeks' salary was insufficient to compensate employee who was constructively discharged for participation in jury duty); *Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (holding employer liable for discharging employee for absenteeism while serving jury duty); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1978) (stating that cause of action existed for damages when employee was discharged for having performed his obligation of jury service).

³⁶ The classic example of this is the cause of action allowed when a worker has been discharged for filing a claim for workers' compensation benefits. See generally MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* § 8.12 (2d ed. 1999). Mississippi remains an exception to the almost universal protection accorded to the exercise of this right, due to the fact that *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981), has not been legislatively or judicially overruled to date.

³⁷ A discharge for this reason would also raise First Amendment issues, but these are beyond the scope of this article.

³⁸ MISS. CODE ANN. § 11-46-5 (Supp. 2001).

³⁹ § 11-46-7(1).

⁴⁰ § 11-46-15 (\$500,000 after July 1, 2001; no punitive damages or attorney

B. *The Mississippi Public Employee "Whistleblower" Statute*

In 1999, the Mississippi Legislature amended existing law, creating remedies for public employees who suffer reprisals for engaging in certain "whistleblowing" activities.⁴¹ This new statutory exception to the employment-at-will doctrine is potentially relevant to the concerns addressed in this article.

Under the "whistleblower" law, any state or local government employee "who in good faith reports an alleged improper governmental action to a state investigative body, initiating an investigation"⁴² or who "in good faith provides information to" such a body, or who "is believed to have" done such things but "in fact, has not" is a "whistleblower."⁴³ If a person, "as a result of" doing something that makes her a "whistleblower," is subjected to "reprisal or retaliatory action,"⁴⁴ that person is entitled to bring suit in state circuit court, where jury trials are available, and seek remedies that include back pay and reinstatement, injunctive relief, compensatory damages, court costs and reasonable attorney's fees.⁴⁵ Importantly, the statutory

fees not specifically authorized by law); *see infra* notes 47, 51, 67 and accompanying text.

⁴¹ See generally MISS. CODE ANN. §§ 25-9-171 to -177 (1999).

⁴² "Improper governmental action" includes

any action by an employee which is undertaken in the performance of the employee's official duties, whether or not the action is within the scope of the employee's employment: (i) Which is in violation of any federal or state law or regulation, is an abuse of authority, results in substantial abuse, misuse, destruction, waste, or loss of public funds or public resources; or (ii) Which is of substantial and specific danger to the public health or safety; or (iii) Which is discrimination based on race or gender.

§ 25-9-171(d). The definition expressly excludes, however, "personnel actions for which other remedies exist." *Id.*

"State investigative body" is defined as "the Attorney General of the State of Mississippi, the State Auditor, the Mississippi Ethics Commission, the Joint Legislative Committee on Performance Evaluation and Expenditure Review or any other standing committee of the Legislature, or any district attorney of the State of Mississippi." § 25-9-171(g).

⁴³ § 25-9-171(j).

⁴⁴ "[R]eprisal or retaliatory action" means, but is not limited to: (a) Unwarranted and unsubstantiated letters of reprimand or unsatisfactory performance evaluations; (b) Demotion; (c) Reduction in pay; (d) Denial of promotion; (e) Suspension; (f) Dismissal; and, (g) Denial of employment." § 25-9-173(2).

⁴⁵ § 25-9-175. Damages, however, are still capped at the amount prescribed in

remedies are not exclusive; rather, they are "supplemental to any other remedies, judicial or administrative, provided for under law."⁴⁶

An employee could not bring suit against the University of Mississippi under this statutory scheme as a result of any retaliation that might follow her reporting of adverse personnel actions taken against her or her co-workers to a designated "state investigative body" (assuming that other internal or administrative or judicial remedies existed to redress such adverse actions). She could, however, bring such an action if her "whistleblowing" activity addressed other matters that might arise during a living wage campaign, such as retaliation after good faith complaints that funds that could be used to improve salaries and working conditions were instead used in such a way as to constitute misuse or waste of public funds or resources. Similarly, good faith complaints to an appropriate "investigative body" to the effect that University administrators' actions (not involving personnel decisions) constituted an abuse of authority (meaning, within the terms of the statute, "acting in an arbitrary and capricious manner that adversely affects the accomplishment of a function of any governmental entity")⁴⁷ would seem to qualify for protection against retaliation.

It should be noted that the statutory scheme contains pitfalls for the unwary "whistleblower." First, she bears the burden of proving by a preponderance of the evidence that "but for [her] providing information or testimony to a state investigative body prior to occurrence of the dismissal or any adverse action, [her] dismissal or any adverse action taken against [her] would not have occurred."⁴⁸ Only the most incompetent

the state sovereign immunity law. *Id.*; see *supra* note 38. This statute also provides for civil fines of up to \$10,000 against members of agency governing boards, authorities, or if none of the latter exist, executive directors for each violation. § 25-9-175.

⁴⁶ § 25-9-177. Employees are required to exhaust available administrative remedies, or grievance or appeal procedures, before bringing such an action. *Id.*

⁴⁷ § 25-9-171(a); see § 25-9-171(d)(i).

⁴⁸ § 25-9-177. This burden is reiterated in section 25-9-173(3) of the Mississippi Code: "An employee who has filed a valid whistleblower complaint may not recover the damages and other remedies provided under Section 25-9-175 unless

of supervisors would ever deliberately convey to a disciplined or discharged employee a clear indication that it was because of her complaint to the appropriate authorities; therefore, any such employee probably would have to have a strong case of circumstantial evidence in order to demonstrate that the reason actually given for the action was pretextual. This would likely be a higher burden than that faced, for example, by plaintiffs bringing suit under federal anti-discrimination statutes.⁴⁹

Second, the court may award a state employer-defendant court costs and reasonable expenses, including attorney's fees, if the court decides that an employee's action under Mississippi Code Annotated section 25-9-175 is "frivolous and unwarrantable." Thus, a prudent counsel would advise against proceeding on a claim such as the hypothetical ones raised above, unless it could be anticipated that most Mississippi jurors and judges would be inclined to view the acts of University officials in question as being clearly a misuse or waste of public funds, or an abuse of authority, as the case may be.

*C. Mississippi Common Law "Handbook" Contracts-
Implied-in-Fact; Tortious Breaches of Contract*

An employer's right to terminate an employment relationship under the employment-at-will rule is subject to a contract-based exception, in addition to the common law and statutory tort exceptions discussed above. Once again, Mississippi jurisprudence mirrors developments elsewhere in the United States. In *Bobbitt v. The Orchard, Ltd.*,⁵⁰ the Mississippi Supreme

the dismissal or adverse action taken against him was the direct result of providing information to a state investigative body." § 25-9-175.

⁴⁹ Cf. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 153 (2000) (holding that because ADEA plaintiff "established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent had intentionally discriminated."). See generally HAROLD S. LEWIS, JR. AND ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE §§ 3.2, 3.10-11 (2001) (describing plaintiff's burden of proof for ADEA claims).

⁵⁰ 603 So. 2d 356 (Miss. 1992).

Court held:

[W]hen an employer publishes and disseminates to its employees a manual setting forth the proceedings which will be followed in event [sic] of an employee's infraction of rules, and there is nothing in the employment contract to the contrary, then the employer will be required to follow its own manual in disciplining or discharging employees for infractions or misconduct specifically covered by the manual.⁵¹

Bobbitt, by its own terms, speaks only to procedural, not substantive, rights contained in a handbook or employment manual. It is likely, however, that handbook provisions creating good cause standards for discharge, or entitlements to certain benefits not otherwise required by law, would likely be enforceable to the same extent as the procedural provisions addressed in *Bobbitt*.⁵²

There are clear limits to the contract-based rights recognized in *Bobbitt*, however. As the language quoted above suggests, and as the holdings in subsequent cases have demonstrated, to be enforceable the provisions must be written, not oral or based upon custom and practice.⁵³ Furthermore, *Bobbitt* contract rights can be nullified by a disclaimer, and arguably almost any written effort to create such a disclaimer will be sufficient. In *Lee v. Golden Triangle Planning & Development District, Inc.*,⁵⁴ the court stated: "Where there is 'something' in the employee handbook disclaiming a contract of employment, the rule developed in *Bobbitt* does not apply."⁵⁵

⁵¹ *Bobbitt*, 603 So. 2d at 357. *Bobbitt* relied on an earlier decision of the court, *Robinson v. Bd. of Trs. of E. Cent. Junior Coll.*, 477 So. 2d 1352, 1353 (Miss. 1985), which held that a public employee's handbook and manual were part of the employment contract. *Bobbitt*, 603 So. 2d at 361.

⁵² See, e.g., *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 776 (9th Cir. 1990) (upholding jury decision finding employer liable for breach of contract where employee handbook stated that layoff decisions would not be made according to company seniority); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (holding that provision of employment manual providing that employee shall not be discharged except for cause is legally enforceable).

⁵³ *Cothern v. Vickers, Inc.*, 759 So. 2d 1241, 1247-48 (Miss. 2000) (holding only written employment provisions are enforceable).

⁵⁴ 797 So. 2d 845 (Miss. 2001).

⁵⁵ *Lee*, 797 So. 2d at 848.

Given the handbook exception to the employment-at-will rule, the question must be addressed: what, if anything, contained in the University of Mississippi's *A Handbook for Faculty and Staff* constitutes a contractually-binding promise, enforceable by otherwise at-will University employees? It is quite clear that the disclaimer in the handbook was intended to assure that the answer to that question is "nothing." The disclaimer reads: "The University of Mississippi reserves the right to alter or amend any policies contained in [the handbook] at any time without notice. These policies are intended only to be guidelines for employment at the University of Mississippi and do not give rise to any contractual rights."⁵⁶

If that statement and the case law discussed above are the only relevant considerations, then University of Mississippi employees could not count on receiving the many substantive benefits and the procedural protections that make up this extensive document.⁵⁷ At the same time, however, there could be no serious doubt that University officials would insist that the employees were bound by the requirements imposed on them therein⁵⁸ and would feel free to take action for any violations thereof accordingly.

There are grounds for contending that the complaint and grievance appeal portions of the handbook, at a minimum, could be judicially enforced if the University chose not to follow its policies in reliance on its disclaimer. The grievance appeal is possibly the most important provision in the handbook, insofar as fall-out from participating in a living wage campaign is

⁵⁶ UNIV. OF MISS. HUMAN RES., *supra* note 20.

⁵⁷ UNIV. OF MISS. HUMAN RES., A HANDBOOK FOR FACULTY AND STAFF, SECTION VIII: BENEFITS, http://www.olemiss.edu/depts/HR/handbook/HB_sec8.html (last modified Nov. 26, 2001). This section catalogs an extensive set of "good things" available to employees, some of which are required by law, others of which are offered at the University's discretion. *Id.* Some of these are: paid personal and sick leave, tuition scholarships for faculty and staff children and professional development for support staff members. *Id.*

⁵⁸ A single illustration should suffice. The University places explicit limits on the ability of its employees to use its space, facilities, and equipment for profit-making purposes. UNIV. OF MISS. HUMAN RES., A HANDBOOK FOR FACULTY AND STAFF, SECTION V: EMPLOYMENT POLICIES, http://www.olemiss.edu/depts/HR/handbook/HR_sec5.html (last modified Nov. 26, 2001).

concerned. Knowledge that the University would be required to permit an appeal is crucial to establishing a campus climate in which fear of retaliation is not dominant.⁵⁹

The relevant location in the handbook is Section VII: "Grievances and Administrative Issues."⁶⁰ It is available to "all permanent employees."⁶¹ Under its terms, except for specifically-excluded subjects,⁶² any claim "that there has been a violation, misinterpretation or misapplication of a rule, policy or procedure in relation to personnel policies" can be presented as a complaint that must be processed through the grievance procedure.

Even though there is not a "good cause" standard for discharge as such in University policies for non-academic employees, there is a detailed "Progressive Discipline Policy for Non-Faculty,"⁶³ which contains a very rudimentary version thereof: "Dismissal is a last resort after other measures have failed and should be reasonably related to the seriousness of the employee's performance in view of his/her length of service and prior record at the University."⁶⁴ Complaints that a dismissal occurred in violation of this standard, as well as complaints

⁵⁹ See *supra* note 2 and accompanying text.

⁶⁰ UNIV. OF MISS. HUMAN RES., A HANDBOOK FOR FACULTY AND STAFF, SECTION VII: GRIEVANCES AND ADMINISTRATIVE ISSUES, http://www.olemiss.edu/depts/HR/handbook/HR_sec7.html (last modified Nov. 26, 2001).

⁶¹ *Id.* Student employees, probationary employees (typically, the initial three to six months of employment) and temporary employees cannot take advantage of the complaint and grievance procedures. *Id.* The rest of the nonacademic employees are considered "permanent." As the fifth circuit noted in *White v. Mississippi State Oil & Gas Board*, 650 F.2d 540, 543 (5th Cir. 1981), however, an agreement for permanent employment of a state worker is terminable at will. The idea of "permanent" employment that can be ended in a moment's notice, for no reason, is merely one of many Anglo-American employment law concepts that takes a little getting used to for the uninitiated.

⁶² UNIV. OF MISS. HUMAN RES., *supra* note 60. Discrimination and sexual harassment claims must be presented to the Office of Equal Opportunity and Regulatory Compliance, and "issues related to salary," "a supervisor's evaluation of performance," "determination of classification" and "suspensions or reprimands" are deemed not subject to the grievance process. *Id.*

⁶³ UNIV. OF MISS. HUMAN RES., *supra* note 57.

⁶⁴ *Id.* It must be pointed out that, consistent with the primary employment-at-will declaration discussed above, the progressive discipline policy contains a statement that it "does not alter or affect the University's employment at-will policy." *Id.*

about other aspects of alleged "violation, misinterpretation or misapplication of" the progressive discipline policy, would be legitimate subjects of the grievance appeal process and are recognized as such in the progressive discipline policy itself.⁶⁵ Therefore, as long as the University functions as a "good" employer and honors its commitments under its handbook, any employee who believed that she had been discharged, or denied the benefits of the progressive discipline policy, as a result of participation in the living wage campaign could take her complaint to a "Personnel Action Review Board," a three-member panel composed of a department head or higher, a member of the Staff Council and a third person appointed by the Chancellor; none of the members of this board can be from the department of the grievant. Decisions of this board can be appealed to the Chancellor, whose decision is final.

A grievance system like this, even though completely in-house, would serve as an invaluable check on arbitrary retaliation if it functioned in an open, fair way. Department-level supervisors would be less tempted to use, or threaten, retaliation to dissuade worker participation in a living wage campaign, or to make examples of activists, if they knew their actions would be subject to review by a panel composed of administrators and staff from other departments and that the final decision would be appealable to the Chancellor.⁶⁶ Realis-

⁶⁵ *Id.*

⁶⁶ The current Chancellor, Robert C. Khayat, a law professor, wrote a letter to the student newspaper following the December 7, 2000, living wage public meeting, in which he responded to the assertions that employees were fearful of retaliation. See *supra* note 2. The Chancellor said:

During my tenure at the University, which began in 1969, I have never been aware of any person being terminated or threatened with termination for expressing his or her views.

This is an open environment, and we encourage free expression of ideas and opinions, including criticism.

In the event that any faculty or staff person has any reasonable basis for believing that he or she will be penalized for expressing opinions regarding compensation or other matters of interest, I urge that person to contact me. We will not tolerate any intimidation of freedom of expression.

Robert C. Khayat, Editorial, *Staff Is Free to Speak Their Mind*, THE DAILY MISSISSIPPIAN, Dec. 11, 2000, at 3, available at <http://www.thedmonline.com/vnews/>

tically, it must be acknowledged that proving retaliation is a very difficult proposition. The reasons given for disciplining or discharging a worker are invariably job-related; only the most hapless of supervisors would ever make a record of express retaliatory intent. If it were possible to get inside the supervisor's mind, one might find: (a) that the articulated reason was a pure pretext for retaliation; (b) that there was resentment about the worker's activities, but the supervisor also had decided that something about the worker's job performance was now unacceptable; or (c) the worker's activism played no role in the supervisor's decision. The benefit of a neutral review is that fact-finders not involved in the actual decision can hear evidence from both sides about the events (the grievant can have advice of counsel) and, given an adequate basis, overrule the departmental decision, notwithstanding the supervisor's point of view. The author has participated in a University grievance on behalf of a fellow employee in which just such a result occurred.

Like many private employers, however, the University's disclaimer would allow its officials to decide whether, or when, to honor its grievance appeal policy.⁶⁷ If this is legally effective, the University could disown its own policies and an employee would be denied both an internal and a judicial remedy. There are at least two reasons why it should not be legally effective, however. The first is that IHL Board policy requires the University to have a grievance appeal policy.⁶⁸ Thus, this

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⁶⁷ Together with the "employment-at-will statement," see *supra* note 20 and accompanying text, it also operates to defeat any claim that an employee has been deprived of a Fourteenth Amendment property interest without due process of law. See *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that genuine issue of fact presented where non-tenured teacher offered evidence of college guidelines creating implied condition of continued employment).

⁶⁸ BOARD OF TRUSTEES POLICIES AND BYLAWS, *supra* note 14. Section 405.01 of the IHL Board policies defines a grievance as "the claim of an individual employee that there has been a violation, misinterpretation or misapplication of a rule, policy or procedure in relation to personnel policies, including working hours, working conditions, leaves, promotions and other conditions of employment." *Id.* § 405.01. Section 405.02 then mandates an appeal to a university grievance committee and review of its decision by the "Institutional Executive Officer." *Id.* § 405.02

is not something that the University is free to honor or ignore in the same way that a private employer could have its cake and eat it too. It is a well-established principle of administrative law that public entities must comply with the regulations that apply to them.⁶⁹

Second, notwithstanding the clear language of the Mississippi Supreme Court concerning the enforceability of disclaimers in *Lee v. Golden Triangle Planning & Development District, Inc.*⁷⁰ that opinion also contains the seeds of an argument to the effect (perhaps) that deliberately flouting published procedures could give rise to liability regardless of a disclaimer. In *Golden Triangle*, immediately following the conclusion "that Golden Triangle's handbook failed to create a contract of employment," the Court took up the plaintiff employee's argument that "[n]otwithstanding the valid disclaimer . . . [plaintiff's] termination was in violation of the employee handbook."⁷¹ The handbook in question, like the University of Mississippi's, had a progressive discipline system and grievance procedures.⁷² The majority opinion stressed that "Golden Triangle followed the procedures outlined in the employee handbook" (she was given a hearing at which her attorney was allowed to participate)⁷³ and concluded that "[the plaintiff] fails to raise any genuine issue of material fact that her termination was in violation of the employee handbook."⁷⁴

The intriguing question is why did the majority even feel

⁶⁹ See, e.g., *Borden, Inc. v. FERC*, 855 F.2d 254 (5th Cir. 1988); *Shell Oil Co. v. FERC*, 664 F.2d 79 (5th Cir. 1981) (stating that "[a]n agency must conform to its existing regulations absent a clear and acceptable explanation for its departure").

⁷⁰ 797 So. 2d 845 (Miss. 2001).

⁷¹ *Lee*, 797 So. 2d at 848-49.

⁷² The discipline procedures began with the statement that "[t]he following steps will generally be followed." *Id.* at 849 n.2. The handbook also articulated "just causes" for invoking discipline. *Id.* n.1.

⁷³ *Id.* at 850.

⁷⁴ *Id.* at 851. Justice McRae, in dissent, urged that the plaintiff had been deprived of the benefits of the progressive discipline system and had been illegally discharged in retaliation for hiring an attorney and invoking the grievance system. *Id.* at 853-54 (McRae, P.J., dissenting). The majority opinion ignored his first point, and specifically declined to expand the *McArn* doctrine to include this kind of retaliation. *Id.* at 851.

compelled to explore the question of whether the plaintiff's termination violated the employee handbook? They had just ruled that the defendant employer was not legally obligated to follow it (as a matter of contract law), so why could this inquiry possibly be relevant? Are there estoppel issues that could come into play, even in the presence of a disclaimer?⁷⁵ Is there a possibility that in an egregious case of not following handbook policies, even with a disclaimer, a majority of the Mississippi Supreme Court might lean toward dissenting Justice McRae's view? Justice McRae stated that:

Golden Triangle should be held to the provisions it forced upon its own employees. Golden Triangle encouraged its employees to adhere to the provisions of the handbook, and therefore, led its employees to believe that the provisions would be enforced, whether to their benefit or not.

Requiring employees to adhere to the provisions of the employee handbook, and then not enforcing the same provisions when it appears unfavorable to the employer does not establish or foster a good working relationship. The employee handbook acts as a two-way street, informing the employee[s] of their benefits as well as the consequences of their actions. An employer should not be allowed to ignore and disregard all the provisions in an employee handbook if this material is disseminated to all employees, and the employees agree to abide by it.⁷⁶

If a breach of an employment contract can be made out and if "such breach is attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort," Mississippi law recognizes a claim for tortious breach of contract.⁷⁷ Although punitive damages would not be available

⁷⁵ Modern Mississippi jurisprudence recognizes the availability of equitable estoppel when the party asserting it can "show (1) belief and reliance on some representation; (2) change of position as a result thereof; and (3) detriment or prejudice caused by the change of position." *Cothorn v. Vickers, Inc.*, 759 So. 2d 1241, 1249 (Miss. 2000). It must be said that the defense that there could be no reasonable reliance in the face of the disclaimer seems obvious in such a case, however.

⁷⁶ *Lee*, 797 So. 2d at 852 (McRae, P.J., dissenting).

⁷⁷ *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 543 (Miss. 1996).

against the University because it is an arm of the state,⁷⁸ other tort damages would be available, to the extent they exceed contract measures of damage, up to \$500,000.⁷⁹

D. Mississippi Common Law Covenant of Good Faith and Fair Dealing

One final subject⁸⁰ merits discussion in connection with the current state of Mississippi's legal standards affecting dismissals from employment: breach of the covenant of good faith and fair dealing.⁸¹ Several other jurisdictions have held that an employee can state a claim under this theory, although there is not agreement on what action gives rise to a breach of the covenant⁸² or whether such a claim arises in tort or contract.⁸³

Mississippi jurisprudence is astonishingly muddled on the

⁷⁸ See *supra* notes 36-38 and accompanying text.

⁷⁹ MISS. CODE ANN. § 11-46-5 (Supp. 2001).

⁸⁰ Mississippi law recognizes other potential tort claims that can arise in connection with employee adverse actions, but which will not be addressed herein. Some of these are: tortious interference with contract, see *Levens v. Campbell*, 733 So. 2d 753 (Miss. 1999) (recognizing this cause of action could lie when the tortfeasor is a supervisory employee); invasion of privacy, see *Young v. Jackson*, 572 So. 2d 378 (Miss. 1990) (recognizing cause of action but also permitting invocation of qualified privilege for information that employer had good reason to share with co-workers); and, intentional infliction of emotional distress, see *Brown v. Inter-City Bank for Sav.*, 738 So. 2d 262, 265 (Miss. Ct. App. 1999) (claims for intentional infliction of emotional distress "are usually not recoverable in mere employment disputes").

⁸¹ Section 205 of the *Second Restatement of Contracts*, provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 205.

⁸² In the early leading case of *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977), the doctrine was invoked because the employer discharged the employee to avoid paying a commission that the employee had already earned. In *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992), the court adopted a much broader standard, holding that for the covenant to be breached it was only necessary to show that "the conduct of the employer must constitute an aspect of fraud, deceit or misrepresentation."

⁸³ The Supreme Court of California, having first set that jurisdiction on the course of treating such claims as arising in tort, see *Cleary v. Am. Airlines, Inc.*, 168 Cal. Rptr. 722 (Cal. Ct. App. 1980), limited damages (and the attractiveness of this claim) to those available for breach of contract, see *Foley v. Interactive Data Corp.*, 765 P.2d 373 (1988).

covenant of good faith and fair dealing. On the one hand, there is a growing body of opinions in which the supreme court, the court of appeals, and the federal courts (in *Erie* holdings) have clearly and without qualification held that "at-will employment relationships are not governed by a covenant of good faith and fair dealing which gives rise to a cause of action for wrongful termination."⁸⁴

On the other hand, other Mississippi Supreme Court decisions acknowledge that the covenant of good faith and fair dealing exists in the employment contract relationship. In *Empiregas, Inc. v. Bain*,⁸⁵ the Mississippi Supreme Court awarded an employee who was terminated "in bad faith" an annual bonus even though his contract of employment expressly provided that if he were terminated prior to a certain date he would not be entitled to the money.⁸⁶ In holding that the employee was entitled to the bonus, even though the employer had acted under its express rights in the employment contract, the court stated: "[I]t was Empiregas which breached the duty which the parties had to each other to deal in good faith by firing Bain without good cause. Accordingly, Bain was entitled to receive the bonus which had accrued."⁸⁷

Furthermore, both the *McArn*⁸⁸ and *Willard II*⁸⁹ opinions ground the public policy "retaliatory discharge" claim in a tortious breach of the covenant of good faith and fair dealing. In *McArn*, the supreme court, in the course of surveying its case law following *Kelly v. Mississippi Valley Gas Co.*,⁹⁰ observed that "[w]e also said that wrongful discharge actions, which are not founded on contract, essentially sound in tort. . . . The theory is based on an implied covenant of good faith and fair dealing, when breached by malicious termination or harass-

⁸⁴ *Young v. N. Miss. Med. Ctr.*, 783 So. 2d 661, 663 (Miss. 2001); see also *Echols v. Kroger Co.*, 2000 U.S. Dist. LEXIS 510 (N.D. Miss. Jan. 14, 2000); *Hartle v. Packard Elec.*, 626 So. 2d 106 (Miss. 1993); *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086 (Miss. 1987).

⁸⁵ 599 So. 2d 971 (Miss. 1992).

⁸⁶ *Empiregas*, 599 So. 2d at 977.

⁸⁷ *Id.*

⁸⁸ *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993).

⁸⁹ *Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437 (Miss. 1999).

⁹⁰ 397 So. 2d 874 (Miss. 1981).

ment, gives the victim a tort action for wrongful discharge."⁹¹

In *Willard II*, the Supreme Court stated:

The basis of the action in this case is breach of the employment contract. Retaliatory discharge, found by this Court to be an independent tort in *Willard I*, is but another form of tortious breach of contract. Describing retaliatory discharge as an independent tort does not mean that the underlying cause of action is not one for breach of contract. Turning to sister jurisdictions for guidance, several courts have found that an action for retaliatory discharge is a contract action.⁹²

In the *Willard* case itself, there was a proven breach of an implied-in-fact contract—the published employee handbook. In *McArn*, however, there was no handbook implicated. If the reasoning of *Willard II*, quoted in the previous paragraph, is to be applied to the facts of *McArn*, the only possible contract provision that could have been tortiously breached would have been the implied-in-law covenant of good faith and fair dealing.

What is one to make of such contradictory cases? Perhaps a candid observation by the Mississippi Court of Appeals in *Adams v. Institute of Community Services, Inc.*,⁹³ an employment discharge case, is the proper resolution of the matter:

[W]hat Adams fails to realize is that our supreme court has held that "every contract contains an implied covenant of good faith and fair dealing." . . . Such a covenant has never precluded our supreme court from holding that an "at will" relationship means that "either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract."⁹⁴

Adams, however, ignores the supreme court's clear and repeated theoretical underpinning for the "retaliatory discharge" in the covenant of good faith and fair dealing, as well as the implications of the supreme court's conclusion that there

⁹¹ *McArn*, 626 So. 2d at 606 (citation omitted); see also *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1089 (Miss. 1987).

⁹² *Willard II*, 754 So. 2d at 442.

⁹³ 727 So. 2d 739 (Miss. Ct. App. 1998).

⁹⁴ *Adams*, 727 So. 2d at 743 (citations omitted).

had been a breach of the covenant of good faith and fair dealing in *Empiregas*.⁹⁵ An equally plausible reconciliation of the apparent inconsistencies would be that the "public policy exception" theory is potentially much broader than the two limited categories recognized to date and that other kinds of "malicious termination or harassment" in retaliation for exercising rights recognized by public policy will be recognized by the supreme court in the future.

CONCLUSION

The employment-at-will rule and the culture in which it exists make it extremely difficult for workers to freely and openly participate in efforts to improve their working conditions. During the last decade, Mississippi's courts and legislature have opened up avenues of redress for retaliatory discharges that were not available the last time the University of Mississippi's low-wage workers tried to influence their destiny (an abortive effort to unionize).⁹⁶ The efficacy of such remedies will remain quite limited, however, given their attendant litigation hurdles and uncertainties. Ultimately, it is worker solidarity—and effective organization thereof—that will determine the long-term success of any efforts to obtain and sustain a living wage at the University.

⁹⁵ This is particularly strange, given that the *Adams* opinion cited *Empiregas* as support for its conclusion, as quoted in the text of this article. *Id.*

⁹⁶ An unsuccessful organizing drive was mounted at the University of Mississippi by the Mississippi Alliance of State Employees, affiliated with the Communications Workers of America.

THE PRACTICE OF DUAL ARRESTS IN DOMESTIC VIOLENCE SITUATIONS: DOES IT ACCOMPLISH ANYTHING?

*Sandy Chesnut**

There are a lot of questions surrounding the field of domestic violence. But probably, the most often asked question in the domestic violence field is: Why doesn't she just leave? Another very common question is: Why doesn't she just call the police if he is abusing her?¹

For those of us who have not experienced domestic violence first hand, it is very hard to comprehend why someone would remain in such a volatile situation. But our response to domestic violence is very individualized and depends on a myriad of factors, some obvious and some not so obvious.

Most people want their marriages or relationships to work. You invest a lot of time and energy into a relationship. You love the person with whom you have made the decision to spend your life. But, you say, domestic violence is different; why would anybody stay in a situation like that? But couldn't we also ask the question—why do spouses of alcoholics stay with an alcoholic? Living in either of these situations is very

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¹ The author recognizes that domestic violence is not solely a crime committed by men upon women. It is also perpetrated by females upon males; however, statistics show that 95% of domestic violence is committed by men. Accordingly, for ease of reading and to conform to statistical data, the batterer/abuser will be referred to in the masculine form, and the victim will be referred to in the feminine form. NAT'L INST. OF JUSTICE, U.S. DEP'T OF HEALTH & HUMAN SERVS., A REPORT OF THE VIOLENCE AGAINST WOMEN RESEARCH STRATEGIC PLANNING WORKSHOP (1995).

difficult for the spouse as well as the children, and whether it is caused by alcoholism or abuse, the effects of living in such a stressful environment can be devastating and long-term. Even though the two situations are different, the reasons for staying are often the same. Most victims of domestic violence stay for the same reasons a spouse of an alcoholic stays—they believe that the person will change if they stick with them long enough. People tend to rationalize, after all, you loved them enough to marry them and have children with them; they can not be all that bad, especially if they get the help they need. Spouses of alcoholics do not want their partner arrested for public drunkenness; they just want the drinking to stop. Likewise, victims of domestic violence do not want their partners arrested; they just want the violence to stop.

Would you call the police if you were confronted with a domestic violence situation in your home? At first blush, you would probably say, "Of course I would." After all, we are taught as young children that the police are there to protect us. Furthermore, it is not uncommon to see the emblem of "To Protect and Serve" on law enforcement vehicles. But how comfortable would you really feel asking for outside intervention in a situation occurring inside your own home?

Just how far does the violence have to go in our own home before we will actually take that step of calling on outside intervention? Obviously, there are varying levels of domestic violence, and depending on our own individual backgrounds, there are varying levels of behaviors that we will tolerate before seeking outside intervention.

In order to understand some of the dynamics that the victim of domestic violence is faced with, imagine yourself in the following scenario.

Would you call the police if your spouse became enraged during a seemingly otherwise normal dispute, approached you in an intimidating manner and yelled a string of obscenities while blocking your path out of the room or the house? Even though you might be extremely terrified by this type of behavior, odds are the majority of us probably would not seek outside intervention by calling the police in this situation.

However, if in the above scenario, your spouse grabs a

knife off of the kitchen counter and holds it in a threatening manner while exhibiting the above described intimidating behaviors, you might be more inclined to call for outside assistance. But then again, you're scared, and this *is* your spouse that you chose as your life-mate. You do not want to make the situation any worse, do you? Calling the police would certainly make him angrier than he is now and besides, how do you get to the phone without making the situation worse? And there are the children to think about. Even if they are not in the room, they have heard the yelling and they know Daddy is mad about something. Maybe if you just let it go, your spouse will calm down and the kids will not have to hear any more yelling. You certainly do not want the kids to be involved in a situation where the police have to talk to their father and try and calm him down, do you? Will the kids blame you, if you call the police and they take their daddy away to jail?

But, what if in the above scenario, your spouse hits you across the face. Does this change the whole picture? Are you now willing to risk further violence by running to the telephone? Are you now willing for your children to be involved in a law enforcement call in their own home? Do you feel comfortable that the police will be able to assist you by the time they arrive? Are you now willing to have your kids witness their father being arrested and taken to jail? Do you really want your husband to be arrested and go to jail? If he is arrested and goes to jail, he may risk losing his job, and we all know that it takes both incomes these days to pay the bills. Even if your husband is not taken to jail, he's going to be very angry that you called the police, and where will you and your children go to avoid further violence? Can you depend on the police to get you out of the situation safely?

Let's take the scenario a bit further. You are terrified by the situation, and you instinctively go for the phone. However, your spouse blocks your path and in a moment of sheer terror, you swipe at his face and hit him with your fingernails just in order to make it to the phone. Now your husband has obvious signs of abuse on him. However, you may or may not have obvious signs of abuse depending on several factors, such as

the force of the blow to your face, how your skin reacts to trauma, and how long it takes for the police to arrive.

Upon arrival at the residence where the above scenario has just played out, who do you think the police would find to be the most hysterical—the abuser or the victim? Logically, we would expect the victim of a crime to be the most out-of-control party. If we analogize the domestic violence crime to other crimes, such as the crime of rape or robbery, this does not seem unreasonable. However, for some reason, in domestic violence cases, the victim is often times expected to present herself in a calm, rational manner or risk being blamed as the aggressor in the situation! If we look at our scenario, the police arrive on the scene to find that the woman is hysterical and has little or no signs of abuse on her, but the man has bloody, red scratch marks on his face. So who do you think the police will most likely arrest in this situation? Even if the perpetrator is arrested, odds are under current practice that the victim will also be arrested because of the scratch marks—even if they were made defensively.

On the other hand, in a typical rape case, if the victim fights back and leaves marks across the perpetrator's face, we do not automatically discount the fact that the perpetrator committed the crime. In fact, we often blame the victim of rape for not fighting back and trying to protect herself. So why should we automatically assume the reverse in domestic violence cases and place the fault on the victim when she tries to protect herself?

"It was only in the 1970's that the criminal justice system . . . began to treat domestic violence like other assaults."² But do we really treat domestic violence like other assaults or other crimes in general?

² LINDA A. MCGUIRE, Esq., MINN. CTR. AGAINST VIOLENCE & ABUSE, CRIMINAL PROSECUTION OF DOMESTIC VIOLENCE, at <http://www.vaw.umn.edu/BWJP/prosecuteV.htm> (last visited Apr. 1, 2001).

I. MANDATORY ARREST

Section 99-3-7(3) of the Mississippi Code provides for mandatory arrest in situations where law enforcement has probable cause to believe that an individual has committed an act of domestic violence.³

In many ways, this is a good law. This law allows the police to press the charges against the abuser instead of relying on the victim to do so. Understandably, the victim of domestic violence may have many reasons why she would not want to press charges against her husband. The family is economically dependent on the abuser's income, the victim is emotionally and legally connected to the abuser, and the children may not understand why Mommy would do something like that to Daddy. In addition, pressing charges will very likely escalate the abuse for the victim as well as for the children.

The children of abused mothers are also at risk of suffering abuse.⁴ Even if the children are not physically abused, they are emotionally traumatized by living in such a stressful and volatile environment. The home should be a safe haven for everyone living within, especially for the children. Common sense tells us that the mere fact that the children have either witnessed first-hand or overheard the altercations between their parents has a traumatizing effect on them.

Another advantage to this law is that it takes the power away from the victim to drop the charges. Under this law, it is the State of Mississippi that presses the charges against the abuser, not the victim. Therefore, the victim cannot drop the charges. Accordingly, the abuser is accountable to the State of Mississippi for his criminal behavior. However, even though the victim can not drop the charges, in many cases she has been persuaded by the abuser to not testify against him (even if she is under subpoena) or to lie (even though she may face

³ MISS. CODE ANN. § 99-3-7(3) (2000).

⁴ E. Stark & A. Flitcraft, *Spouse Abuse, in VIOLENCE IN AMERICA: A PUBLIC HEALTH APPROACH* 142 (Rosenberg & Fenley eds., 1991).

perjury charges) about the circumstances that took place. Many victims would rather face the consequences of disobeying the law in an effort to decrease the violence than to take a chance on facing more extreme violence at the hands of their partner.⁵

II. DUAL ARRESTS

However, after witnessing the way this law has been implemented by law enforcement and the courts, there are some disadvantages to this law as well. This law is designed to protect the victims of domestic violence; however, in practice it often serves only to unintentionally further victimize the victim. This law lacks language regarding ascertaining the principal aggressor in domestic violence situations. Therefore, it allows the practice of "dual arrests" in cases where both parties have "marks." In fact, this has become the unofficial policy of many local law enforcement agencies. Accordingly, in the above referenced scenario, upon first glance and without further proper investigation into the matter, the police may arrest the victim based solely upon the fact that he has "marks" and she does not. Or the police may arrest both parties if they see "marks" on both individuals. This clearly is a disservice to the victims of domestic violence. The thought behind the "dual arrest" is that the judge can sort things out in court, and the true victim and true perpetrator will be identified and dealt with accordingly at that time. However, in practice, this does not occur and the victim ends up with a charge of domestic violence on her record.

In many cases, the victim is persuaded to plead guilty to the charge in order to clear the overloaded docket. In other cases, where the victim does not want to pursue the charges against her husband, she pleads guilty to her own charges in hopes that the prosecutor and judge will not be harsh with her or her husband. In other cases, the victim is in such emotional turmoil, she is clueless as to what is happening to her, she admits that she struck her husband, but fails to explain or

⁵ See *supra* note 1.

does not realize that she can explain that it was done in self-defense.

Furthermore, in situations where there are no visible signs of abuse, the police may or may not do anything upon arrival. The law requires "probable cause" in order to arrest. The only information they have to go on is what the victim tells them and what her spouse tells them, unless of course there are witnesses such as children or neighbors. However, unless the police have received domestic violence training, are knowledgeable in the dynamics involved in domestic violence situations and are sensitive to the domestic violence victim's plight, odds are they will only talk to the two people involved and upon seeing no signs of altercation, leave the residence without talking to the children or neighbors.⁶

Moreover, since Mississippi does not have a special domestic violence response team, the treatment that victims of domestic violence receive varies greatly from situation to situation. Victims have reported to court advocates that they were told by the police, if they (the police) had to come back out to the residence, both parties were going to jail. Although this may seem to some as a good way to curtail violence in the home, it is not effective. This threat by law enforcement does not eliminate further violence, but it does greatly reduce the chances that the true victim of the crime will ever call for assistance when she and her children most need the assistance.

Dual arrests are especially problematic and often have profound effects on the victim not only in the criminal arena but in the civil arena as well. If the victim of domestic violence has also been arrested and convicted of domestic violence, the abuser can use this against her in obtaining custody of the children in chancery court. For example, in our scenario, if the police relied solely on the fact that the husband had obvious signs of abuse (i.e., the scratch marks on his face) and

⁶ However, most officers have at least been trained in domestic violence calls to provide information regarding local domestic violence centers and services provided by these centers, and it seems that most officers are in fact providing this information.

only arrested the wife, this could weigh heavily against her in any future custody proceedings. Additionally, if the wife pled guilty to the charge in criminal court, this would only compound the problem. The husband, of course, would argue that she not only was arrested for domestic violence, she pled guilty to it!

Men who abuse their partners are twice as likely to seek sole custody of their children than are men who do not abuse their partners.⁷ In fact, the husband's threat to take the children away from the wife is, in many situations, the very threat that keeps the wife from leaving an abusive situation in the first place. In domestic violence situations, the husband exerts extreme power over the wife by threats and intimidation, and the wife begins to see the husband as being "larger than life," believing that he is capable of "making good" on his threats. Additionally, the abuser may be the primary breadwinner and/or the spouse in control of the family finances. The abuser frequently uses his superior financial status to threaten to obtain the best legal assistance and take the children from the wife's custody.

Dual arrests or arresting solely on the basis of who has "marks" whether they are offensive or defensive in nature, only exacerbates the situation for the "true" victim and increases the likelihood that the husband will in fact gain custody of the children. However, in most cases, the fact that she has a conviction for domestic violence which can be used against her in the custody proceeding is all the ammunition the abuser needs to keep her from attempting to leave the abusive situation.

III. THE "PRINCIPAL AGGRESSOR" LANGUAGE

In an effort to curtail the devastating effects associated with charging and arresting the victim of domestic violence, House Bill 868 was introduced by the Mississippi Legislature during the 2001 Regular Session which would require law

⁷ AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT ON THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY (2000).

enforcement officers responding to domestic violence calls to attempt to determine the principal aggressor. House Bill 868 would amend section 99-3-7 of the Mississippi Code as follows:

(3) (b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor which is an act of domestic violence, or if two (2) or more persons make a complaint to the officer, the officer shall attempt to determine who was the principal aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer's best judgment in determining probable cause.

(c) To determine who is the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors:

- (i) The history of domestic abuse between the parties;
- (ii) The relative severity of the injuries inflicted on each person;
- (iii) Evidence from the persons involved in the domestic abuse;
- (iv) The likelihood of future injury to each person;
- (v) Whether one (1) of the persons acted in self-defense; and
- (vi) Evidence from witnesses of the domestic violence.

(d) A law enforcement officer shall not:

- (i) Threaten, suggest or otherwise indicate the possible arrest of all parties to discourage future requests for intervention by law enforcement personnel; or
- (ii) Base the decision of whether to arrest on:
 - 1. The consent or request of the victim; or
 - 2. The officer's perception of the willingness of the victim or of a witness to the domestic abuse to testify or participate in a judicial proceeding.⁸

The principal aggressor language is an essential element in the laws that are devised to protect victims of domestic vio-

⁸ H.R. 868, 2001 Reg. Sess. (Miss. 2001); see MISS. CODE ANN. § 99-3-7.

lence. Many law enforcement agencies lack the funding to provide specialized training to law enforcement officers in the handling of domestic violence cases. Out of sheer necessity, the practice in most law enforcement agencies is that all officers respond to all types of calls. Accordingly, officers often times lack the necessary specialized training which is essential in dealing with a domestic violence incident. In the absence of funding for specialized training in this area, the principal aggressor language at least identifies the factors that law enforcement should consider, as well as identifying areas that the officer should avoid in dealing with these cases.

Unfortunately, this bill was not adopted by the Mississippi Legislature. Accordingly, where there is no attempt at ascertaining the true victim of the crime, but rather officers resort to a simple "look and see who has marks" test, it is presumed that the trend of "dual arrests" will continue and the victim of domestic violence will continue to be victimized even further in the criminal courts as well as in the civil courts.

It can only be presumed that the "look and see who has marks" test is used as a result of lack of training and/or at the instruction of the officer's superiors. Regardless of the origin, this "test" is not consistent with the typical investigative techniques that law enforcement are taught when learning to respond to different types of crimes. However, whether it's due to a lack of understanding or to a societal perception that domestic violence is a "private" matter, frequently domestic violence calls are not properly investigated pursuant to the investigative techniques used in other crimes.

Understandably, domestic violence calls are probably the most frustrating calls for law enforcement officers. It is a very emotionally charged situation and in most cases, it is very time consuming to thoroughly investigate the incident in order to properly identify the principal aggressor as well as the victim. Additionally, as discussed above, it is also a source of frustration for law enforcement officers when often times after the volatile situation has subsided, the victim may or may not follow through with prosecution of the abuser. Nonetheless, if the initial investigation is properly conducted and documented, it is much more likely that the prosecution can be carried for-

ward with or without the victim's testimony. When you think about it, there's just no good reason why the victim of domestic violence should be victimized any more than she already has been at the hands of someone she loves and believed that she could trust.

It would be hard to imagine anything more devastating to anyone than to be the victim of a crime and then be accused of, charged with and convicted of the very same crime that was committed against that person. Normally, we as individuals and as a society would never tolerate the wrong person being accused of, charged with and convicted of other crimes on a regular basis. Furthermore, we especially would not tolerate the *victim* of the crime being accused of, charged with and convicted of the same crime that was committed against that person. So why have we become so tolerant of victims of domestic violence being treated in this manner?

The principal aggressor language is just one more tool that effectively can be used to combat domestic violence. It is a necessary element in the laws that are designed to protect the victims of domestic violence. It is just one more step to ensure that the abuser and the victim in a very serious crime are properly identified and dealt with accordingly.

CHILDREN'S HEALTH INSURANCE PROGRAM IN MISSISSIPPI: ENROLLMENT BARRIERS AND OPPORTUNITIES FOR INCREASED ACCESS

*Sean A.C. Courtney**

A common problem facing many families across the nation, and especially in Mississippi, is the lack of affordable health care insurance. The legislatures in Jackson and Washington, D.C., have taken notice of this problem, and they have taken steps to increase the availability of access to health care with government-funded health insurance programs, namely Medicaid, Medicare and the State Children's Health Insurance Program (SCHIP or CHIP). With this government intervention, a new problem has revealed itself in the form of government bureaucracy and procedural inequity. Many times, the average person in need of government assistance is not able to attain that help because he or she does not know how to find it or how to navigate the process of acquiring benefits.

I. WHO ARE THE UNINSURED?

According to the most recent National Census, 42.6 million Americans are presently uninsured. Of these, eight of ten are in working families. Included in this number are the 10.6 million American children that do not have any form of health insurance. This means that approximately one child in eight does not have medical insurance. A majority of uninsured children are in families in which one or both parents are working.¹ Of the uninsured children in America, seven of ten

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¹ *Kaiser Commission on Medicaid & the Uninsured*, HEALTH ACTION 2000:

are of color.² Seven of ten are also eligible for either Medicaid or CHIP.³ The number of children in Mississippi without health insurance has been estimated to be 125,000. These children face many obstacles, including a significantly increased exposure to preventable health problems.

The most recent census numbers, while startling, show an increase from the previous census, which reported forty-four million people without health insurance, including eleven million children. The reasons for this decline of the uninsured are varied. The recent economic prosperity in the United States, coupled with a drop in unemployment, may account for some of the decline. Due to the fact that more employers have been hiring more employees and offering them employer-sponsored health insurance, more Americans have recently begun enrolling in private health insurance policies. This practice seems to be drawing to an end. Hopefully, the availability of employer-based coverage will continue, but more recent trends have shown that private employers, especially small employers, are opting not to insure their employees.⁴ Unfortunately, as the economy continues to waver, the number of uninsured may continue to decrease. Another reason that explains the decreasing number of uninsured is the creation of government programs like CHIP in 1997.

II. WHAT IS CHIP?

CHIP was created in the bi-partisan Balanced Budget Act of 1997 (BBA). It is found under the newly created Title XXI of the Social Security Act as amended by the BBA.⁵ Title XXI provides for the use of federal matching funds for states that choose to provide health insurance coverage for uninsured

MOVING FORWARD TOGETHER (Henry J. Kaiser Found., Washington, D.C.), Jan. 2000.

² *Id.*

³ *Id.*

⁴ *Changes in Employee Health Coverage by Small Businesses*, HEALTH ACTION 2000: MOVING FORWARD TOGETHER (Henry J. Kaiser Found., Washington, D.C.), Jan. 2000.

⁵ 42 U.S.C. § 1397dd (2000), amended by Pub. L. No. 106-554, 114 Stat. 2763 (2000).

children.⁶ The BBA provided \$40 billion over ten years to help states expand health care to children whose families were of an income that is greater than the standing Medicaid level which, in Mississippi, is \$5484 per year.⁷

CHIP operates by enabling states to gain coverage for the uninsured in one of three ways. A state can establish a new CHIP program, they can create a CHIP expansion of an existing Medicaid program or they can combine aspects of these two processes.⁸ If a state elects to expand its Medicaid program, all of the existing Medicaid provisions will apply to the expansion. This CHIP remains an entitlement program, while a newly created CHIP program is treated in the same way other block grants are treated.

A separate CHIP program is unlike Medicaid in that it does not usually rely on any consumer-cost-sharing. CHIP is inclusive, with some exceptions. There is no deductible that the eligible recipient must meet, there is no requirement of co-insurance and there are no co-payments for families within 150% of the Federal Poverty Level (FPL).⁹ A co-payment is required of a recipient that falls between 150% and 200% of the FPL, but the annual out-of-pocket expenditures are capped at appropriate levels. For example, these expenditures will not exceed 5% of the family's net income.¹⁰

Despite the many differences between CHIP and other more traditional Medicaid programs, these two programs share some similarities. Medicaid and CHIP are both need-based public assistance programs. Both programs are governed in part by the state government and in part by the federal government. Both programs are required to create and maintain a structured grievance and hearing process. CHIP

⁶ *Id.*

⁷ *The State Children's Health Insurance Program Annual Enrollment Report*, HEALTH ACTION 2000: MOVING FORWARD TOGETHER (Henry J. Kaiser Found., Washington, D.C.), Jan. 2000.

⁸ REQUEST FOR PROPOSAL FOR HEALTH INSURANCE COVERAGE FOR CHILDREN'S HEALTH INSURANCE COVERAGE § 1.2 (1999).

⁹ *Children's Health Insurance Program Group Application and Agreement*, HEALTH ACTION 2000: MOVING FORWARD TOGETHER (Henry J. Kaiser Found., Washington, D.C.), Jan. 20-22, 2000, art. III, § A, at 35.

¹⁰ *Id.*

and Medicaid must also ensure certain rights to their respective consumers. Included in these rights are the right to appeal an adverse decision, the right to disclosure of pertinent information before a fair hearing and the right to have someone speak on behalf of their interests at a fair hearing or appellate review.

Currently in Mississippi, CHIP is comprised of two levels. In the first level, CHIP Phase I, the state's Medicaid program was expanded to cover children ages six to nineteen who are within 100% of the FPL. In January 2000, Mississippi expanded its CHIP program by implementing CHIP Phase II. Phase II expanded CHIP to include children from birth until their nineteenth birthday. The income guidelines were also relaxed to allow more families to enroll. As a result of this expansion, families within 200% of the FPL are currently eligible for CHIP. Some estimates reveal that as many as 125,000 children are eligible for CHIP in Mississippi, although as of December 2000, only 24,026 children were enrolled.¹¹

CHIP is largely a devolution program. This means that the federal government has developed an initiative—health insurance for children in this case—and has developed a method of delivering it to the intended recipient. The federal government believes that states are better suited to spend the money required for the success of these programs, so they package them in block grants and distribute them among participating states. In order to persuade states to carry out the initiative, financial incentives are given to the state, and matching rates are provided. For instance, Mississippi was asked to provide \$10,704,446 and received \$66,735,948 to operate its CHIP program. This means that for every \$1.00 provided by the state, the state received \$5.23, which is the highest return rate in the United States.

The reasons for this devolution of a federal program to the state are varied. The prevailing notions are that states are more able to identify areas in which the program would be able to act most efficiently. With the state having a sense of

¹¹ Telephone Interview with Maria Morris, CHIP Administrator for the Office of the Governor, Division of Medicaid (Feb. 20, 2001).

ownership, it is believed that it will take a more active role in the judicial distribution of funds. With the state taking responsibility for the program, it allows for more citizen involvement. The idea is that the state, rather than the distant federal government, can ensure a more efficient delivery of services, without the hindrance of a federal bureaucracy.

Because of the devolutionary nature of CHIP, the state government must meet minimal reporting requirements and agree to some federal guidelines in order to participate and receive the block grant. Unfortunately, Mississippi has not been able to alleviate CHIP of the bureaucracy that the federal government was careful not to impart upon the intended beneficiary, the children. In effect, as a result of the block grant given to Mississippi, CHIP has replaced a federal bureaucracy with a state-level bureaucracy.

In Mississippi, CHIP is governed by title 41, chapter 86 of the Mississippi Code. The program is administered under a hierarchy that begins with the Federal Department of Health and Human Services. In the state, the State and School Employees Health Insurance Management Board and the Division of Medicaid procure the federal financial assistance. The Department of Finance and Administration then regulates the CHIP monies and provides day-to-day management and administration of the program through the Office of Insurance. The Department of Human Services (DHS) is then charged with the responsibility of administering CHIP, while Blue Cross Blue Shield provides the actual insurance policy utilized by the program.

Between the myriad of state and federal government agencies that share some control of CHIP, there lies the potential for inefficiency. The CHIP program has faced many struggles in Mississippi since 1997. Bureaucracy has created some of the struggles, and some struggles have been alleviated because of various actors in the same system. As CHIP continues to evolve, one of the concerns among health care advocates is that the bureaucracy is too large to allow CHIP to serve in its most efficient form. Solutions that have been promoted among these advocates have included less government action and more citizen involvement, CHIP recipients being named to the CHIP Advisory Board and other non-governmental resolu-

tions.

The goal of CHIP is to provide quality health insurance to children of families who cannot afford the rising costs of private insurance but earn too much money to qualify for other assistance programs such as Medicaid. Unfortunately, completion of this goal has proven to be a hardship in Mississippi. The state has a history that is wrought with images of civil rights abuses, poverty and "pork barrel" politics. With history serving as a backdrop, Mississippi is entering a new century with the opportunity to serve its people by removing the barriers that have plagued assistance programs in the past and ensuring a healthy future.

III. CHIP ENROLLMENT BARRIERS

The low number of children actually enrolled in CHIP has left many health care advocates and state officials scratching their heads. Despite the benefits of a program such as CHIP, and despite numerous efforts to increase the number of participants, Mississippi ranks near the bottom of states for enrolling children in CHIP. Many groups have taken on the task of determining why CHIP enrollment in Mississippi is so low.

Enrollment barriers may vary from state to state, as each state is given some leeway in the design of its CHIP program. Mississippi has avoided some barriers that other states have had to overcome because of the foresight of the original CHIP Commission and government agencies. For instance, Mississippi allows CHIP coverage to be viable for a period of one full year, despite any changes in income during that year. Other states may require recertification every quarter or every six months. Mississippi has also relieved the applicant of completing more than one application for Medicaid and CHIP. These two programs have been consolidated under the umbrella program of Mississippi Health Benefits, and both of the programs can be applied for by completing a single application.

IV. CULTURAL AND LANGUAGE BARRIERS

Inherent barriers to enrollment have plagued Mississippi Health Benefits, as well as other government programs. As

with most outreach initiatives, an obvious barrier is created by linguistic differences. Mississippi has a growing international community, drawing from Latin America, Eastern Asia and other parts of the world. The immigrant population in Mississippi has grown, as it has grown throughout the United States, and has been estimated to total over 100,000 people.¹² Many of these people are laborers, industrial workers and other "blue collar" employees. As such, a large part of this population would be eligible for CHIP or Medicaid. The initial applications and supporting materials for Mississippi Health Benefits were designed exclusively in English; however, since that time, Spanish applications and materials have also been designed and distributed.

The language barrier presents itself in more places than the written application and other printed materials. This barrier is illustrated in the fact that monolingual employees staff most DHS offices in Mississippi, and already difficult situations are often exacerbated when cultural and language barriers are present. Other aspects of the program are also made more difficult for non-English speaking Mississippians, such as the statewide CHIP assistance telephone number.

The state government has been made aware of the difficulties presented in the case of a non-English speaking applicant. The Division of Medicaid has announced that there are plans for a Multilanguage Telephone Hotline for Mississippi Health Benefits. Other government agencies are also attempting to lessen the difficulty posed by this barrier. DHS has announced that it has contracted with translators to provide assistance at the local DHS level. Though the translators are not salaried employees of the state, they can be reached when an appropriate situation presents itself.

¹² 2000 Census, <http://www.quickfacts.census.gov/qfd/states/2800.html> (last visited Feb. 12, 2001). It is important to remember that illegal immigrants are not counted in the census, but their children (if born on United States soil) are eligible for the Mississippi Health Benefits program, so some liberties must be taken with census numbers on immigrants.

THE STIGMA OF WELFARE AND THE ROLE OF DHS
AS BARRIERS TO ENROLLMENT

CHIP is administered through the Department of Human Services. One of the reasons DHS administers CHIP is because of its accessibility and its locality. Each of the eighty-two counties in Mississippi has at least one DHS office, and for this reason, a person who is applying for CHIP must apply through the DHS office in the county in which he or she resides. Mississippi Health Benefits and CHIP are not the only programs administered by DHS. DHS also administers the state's Temporary Assistance to Needy Families (TANF), Aid to Families with Dependent Children (AFDC), Food Stamps, Child Support Enforcement and other programs focused on economic assistance and families and children. Due to its relationship with these programs, the local DHS office is commonly referred to as the "Welfare Office," both internally, among its staff members and in the community.

The connection between DHS and welfare has proven to be a major hindrance to the success of CHIP in Mississippi. While Mississippi Health Benefits and CHIP are indeed need-based programs, the state has taken steps to distance the program from the traditional notions of welfare and other assistance programs. The targeted population that can benefit under CHIP is much wider and more diverse than the population that is served by other assistance or welfare programs. CHIP reaches out to encompass working families within 200% of the FPL, which means that a family of four with a combined annual income of less than \$35,304—or more considering deductions for child care and other factors—could possibly qualify for coverage. For many people in this income bracket, the idea of accepting "welfare" is not a tolerable option.

The stigma of welfare permeates to the point of disabling the program's ability to reach families that could benefit most from CHIP. These families are convinced that CHIP is a program designed to help less fortunate families. Many families are not taking advantage of CHIP by enrolling into Mississippi Health Benefits simply because they think it is a program for someone else. They think it is a welfare program, and they

are confident that they do not need, nor would they ever begin to qualify for, welfare in any shape or form.

To find the effects of the stigma of welfare, one does not have to look very far. Many critics have pointed to this as the reason for the failure of one of the state's largest enrollment initiatives to date, the "Stand Up Sign Up" campaign. The "Stand Up Sign Up" campaign took place in Summer 2000. The goal of the statewide campaign was to enroll 10,000 children into the Mississippi Health Benefits program over the course of one week. Healthcare advocates and eligibility workers from DHS and the Division of Medicaid positioned themselves in local retail outlets, shopping malls, grocery stores and other public places with application materials, hoping to enroll people. County DHS offices lengthened their hours of operation and remained open during the weekend to accept applications. These measures were taken in order to facilitate more office visits by people whose schedule might not allow them to visit the office during regular DHS business hours. In addition to an attempt to allow people more time to visit their local DHS office, the Office of the Governor and the Division of Medicaid launched an advertising campaign that included billboards and print ads, along with radio and television advertisements. The response was disappointing: only a few hundred children became insured through the program as a result of the "Stand Up Sign Up" campaign.

One of the reasons cited for the low turnout for this campaign was the stigma of welfare. As long as CHIP was to be associated with welfare, the chance of someone stopping to complete an application or ask questions in the hustle and bustle of a shopping mall on a Saturday would remain small. People were hesitant to sign up for the program in such a public forum where neighbors and peers could walk by and see them. The longer DHS hours did not prove to help matters either.

The stigma of welfare and its relationship to DHS is not the only deterrent keeping people from approaching their local DHS office. Many people in Mississippi have had contact with DHS in its official capacity before the CHIP program was made available to them. Among these people, much of the contact has been confrontational, whether in a custody con-

test, request for Food Stamps or other context. Despite the fact that the mission of DHS is to help people, especially families and children, the fact of the matter is that DHS is seen as an unwanted adversary in parts of the state and its poorer communities.

For many years, DHS has been the government agency charged with the responsibility of administering welfare programs such as TANF and AFDC. Child Support Enforcement is another program that DHS must administer. Through programs such as these, DHS has been forced to evaluate many people's lives and lifestyles, with the citizen left with feelings of animosity and distrust. Many people have reported that they are skeptical of DHS intentions when they are told to visit their local DHS office to submit a CHIP application. This skepticism is usually based on past personal experience. Regardless of the origin of these feelings, the fact remains that, among many people, there is a reluctance to trust DHS.

The fact that DHS is seen strictly as a welfare agency by the middle class and as an enemy by some of the poor has created a barrier unto itself for CHIP. It is difficult to change long-held perceptions. Until CHIP is removed from the authority of DHS, or until the CHIP-eligible community embraces DHS, its official role will continue to act as a barrier. While there are numerous other barriers to enrollment, this stigma of welfare and the perceived role of DHS have become so prevalent and incurable that they now touch every aspect of low CHIP enrollment numbers, and without a major change, they will continue to do so.

V. THE APPLICATION PROCESS AS A BARRIER

Another more specific barrier to enrollment in Mississippi Health Benefits is the actual application process. On paper, the application process is designed to be simple, requiring the least amount of effort and instruction. The state has amended the application process since its inception, and continues to amend the application process to make it easier. Despite all efforts to ease the burden of completing an application, the opportunity for a qualified person's application to be lost, or denied in error, is always present. Before examining the appli-

cation process as an enrollment barrier, it is important to keep in mind that the application for Mississippi Health Benefits is one application that screens applicants for two separate programs, Medicaid and CHIP, which have different eligibility guidelines and requirements.

The current application used by the Mississippi Health Benefits program allows the applicant to mail in the completed application. Unfortunately, mailing in an application does not guarantee acceptance. The act of mailing in an application has proven to be unpredictable. There are no mailing directions printed on the application. Problems such as insufficient postage, wrong addresses and mishandling have plagued the mail-in application since its inception. For example, the application that is currently used, if mailed in its entirety, exceeds the single-stamp postage rate. A postage rate of \$.55 must be used or the application will not be delivered. Unfortunately, the applicant is not made aware of this fact. A suggestion has been made that the application can be detached from the directions, and sent in for the price of one \$.34 stamp; however, once the required paycheck stub or other supporting documentation is included with the detached application, the cost of postage again exceeds \$.34.

Providing the correct amount of postage is not the only barrier related to the mail-in application. Another factor of the barrier is that in Mississippi, the application must be sent to the DHS office of the county in which the applicant resides. This means there are more than 85 separate collection agencies in Mississippi. Other states, including Kentucky, Louisiana and Alabama, have alleviated mail-in problems by including self-addressed stamped envelopes with each application. After an application is completed and mailed, it is sent to one central post office box, where appropriate action can be taken.

The most glaring problem with the mail-in application is the lost application. One example of a barrier to enrollment that concerns the application process lies in the fact that there are applications that are completed but never arrive in the appropriate location. These lost applications are a very serious issue. Lost applications cannot be reported, and with no documented error, blame is often spread between the applicant, the post office and the local DHS office, with no substance for

support.

The grievousness of these lost applications cannot be overlooked. In most instances, the applicant has no way of knowing that his or her application has been lost. It is not uncommon for an applicant to request an update on the process of his or her application weeks or months after submitting it. It is at this time that he finds out that his application is not on file with the DHS office, and that there is no record of any application ever being submitted by the applicant. Under the authority of DHS, no application has been made, and since a lost application cannot be screened for eligibility, the process must begin again. Obviously, these repeated delays require the child, or children, to live without adequate health care coverage even longer, not to mention the deterrents that these acts become to the applicant. Many applicants have applied for Mississippi Health Benefits on multiple occasions. The steady stream of lost applications and denials brings frustration, and the applicant ultimately resolves not to apply again. Many times this problem goes unnoticed, as there is no way of keeping records on lost applications.

VI. THE STORY OF ALFIA H.

The effect of an application being lost is great, and the toll a lost application takes on the family cannot be underestimated. To exemplify the gravity of the situation, the story of Alfia H. should be considered. In August 2000, Ms. H. applied for the Mississippi Health Benefits program upon finding out that she was with child. In September, Ms. H. sought medical attention at the Central Mississippi Family Health Clinic, where her pregnancy was considered "high risk," and was advised to seek Medicaid coverage as soon as possible. She explained that she had already applied for the program. Within days, she was surprised to find that her application for Mississippi Health Benefits was lost. She was not given any other explanation, other than a form letter that said the application had been lost, and she was free to reapply at any time. Unlike most people who have reported lost applications, Ms. H. was notified by the Lauderdale County DHS that the office had received her application, and then it had been lost. Not

knowing that a serious wrong had been committed, Ms. H. followed DHS's official advice and reapplied in September. She never received any formal notice, positive or negative, regarding her second application. After calling DHS and being told by a DHS representative that her application had again been lost, Ms. H. applied a third time.

Upon Ms. H.'s third application, she was accepted into a Medicaid program for pregnant women. By this time, Ms. H. had not been able to receive much of the medical attention she needed during her pregnancy. The medical attention she was able to procure totalled more than \$3000, and the hospitals were constantly calling and demanding a payment that Ms. H. could not afford. One difference between the Medicaid program for pregnant women and CHIP, though they are both included in Mississippi Health Benefits, is the fact that the former program will cover expenses retroactively to the point of application. This meant that Medicaid would cover Ms. H.'s medical expenses from the date of the successful application. Unfortunately, Ms. H.'s bills had been incurred before the third, and ultimately accepted, application. Though she was relieved to know that Medicaid would cover future medical attention, by the time she received notice regarding her acceptance, Ms. H. held many past due notices for medical attention, and had given birth to a seriously unhealthy baby boy.

After DHS told her that there was nothing that it could do to help, and at the advice of a representative from the Central Mississippi Family Health Clinic, Ms. H. contacted an independent consumer assistance program to seek help in her quest for fairness. It was not until January, when a presentation was made at the State Capitol to a collected group of health care advocates, state legislators and other state officials, including many DHS executives, that Ms. H.'s case was given any serious official consideration. The presentation highlighted the problem of lost Mississippi Health Benefits applications and the inadequacy of the CHIP denial notice, which since has been changed. Among the attendees, there were those who said that most lost applications were the fault of the applicant, and there were those who blamed the post office, but the fact that many applications never reached the process of determining eligibility could not be denied. When

the story of Alfia H. was told, the general response was one of surprise, and the state DHS, the same office that Ms. H. had contacted several times, vowed to respond appropriately.

Almost a full month after the meeting at the State Capitol, Ms. H. received a notice from Lauderdale County DHS stating her July application was denied in error, and she had been reinstated retroactively for these lost months. The notice went on to say that any care received in the months beginning April 1, 2000, would also be retroactively covered under Medicaid. Unaware that Ms. H. could not afford any out-of-pocket medical expenses, and therefore becoming eligible for Medicaid, the final statement of the notice assured the Division of Medicaid would also reimburse Ms. H. for any related expenses that she may have personally paid. Alfia H.'s son, at four months old, was released from the hospital on February 24, 2001. He has been diagnosed with Chronic Lung Disease, among other ailments, and weighs just over six pounds. Ms. H. believes that if she had been determined eligible for Medicaid upon receipt of her first application, she would have been able to receive the pre-natal care required to prevent the illnesses from which her son suffers.

VII. OFFICIAL CONFRONTATIONS AS ENROLLMENT BARRIERS

When a family is applying for Mississippi Health Benefits, the applicant is often frustrated and feels disenfranchised. Each applicant is different and approaches DHS with a different disposition. The applicant may be experiencing a sense of hurt pride, or the applicant may be skeptical of a state government that has a history of being less than helpful. These feelings, combined with an over-burdened DHS office can lead to personal confrontations and uncooperative dispositions on both sides of the desk. Many of the complaints made by applicants are centered on confrontations with DHS workers and perceived mistreatments.

While this barrier has been reported at a higher rate from the most rural of counties, the problem of official confrontations is not peculiar to any one county in Mississippi. Its prevalence in the more rural counties might be attributed to small-

er, closer, more personally intermingled communities. It is a particularly troubling barrier because it often goes undocumented. Applicants who feel as though they have been mistreated do not know the appropriate office which they should contact regarding these actions. This kind of problem also has a chilling effect on future would-be applicants. It lends itself to word-of-mouth repetition and rumors, and more people, rightly or wrongly, hesitate to visit a particular office for fear of mistreatment or a lack of cooperation. While this problem may not plague every DHS office, without the proper training and office etiquette, it has the potential to do so.

The most common way to avoid any official confrontation is to mail in the application. Although the application does contain the address for the local DHS, the applicant can call the toll-free telephone number on the application to attain the appropriate mailing address. However, as previously noted, mailing in an application is not without its risks. Unfortunately, when using the mail rather than hand-delivering an application, the applicant has no way of documenting that the application was received by DHS, unless it is sent by certified mail.

VIII. REMOVING BARRIERS

As the Mississippi Health Benefits program has evolved, and as efforts to increase its efficiency and coverage continue, changes have been made to its core structure. Just as Phase II was created to allow more children to receive insured medical attention, other barriers have been identified, and more changes have been made to the program, to facilitate a broader enrollment. During the evolution of CHIP and Mississippi Health Benefits, some of the features of the application process that were once considered barriers have been removed. For example, in its original manifestation, there was a requirement that birth certificates be presented for each child who was listed on the application. This requirement was seen by many to be an unnecessary burden, and subsequently has been removed.

Barriers to enrollment are more far-reaching than their immediate effects on the applicant. These barriers do not serve the state's best interests. Aside from the detrimental ef-

fects that plague a family that must live without affordable, quality health insurance, the state suffers financially when families are not able to take advantage of the insurance provided under Mississippi Health Benefits. The state will often treat sick or injured children, who would otherwise be able to visit a physician, at emergency rooms and clinics across the state. In fact, one in four uninsured children will use the emergency room as their regular source of medical attention, or choose not to receive professional care.¹³ The treatment that is rendered on these occasions is funded by state tax dollars rather than federal dollars from the CHIP fund. In addition to this, if a state does not use the money given to it by the federal government, there is the real possibility that it will be recalled and distributed to other states, which have depleted their CHIP funds and are requesting more money. For instance, Mississippi was recently asked to return more than \$9,000,000 from an estimated \$26,000,000 in unused CHIP monies.

To better serve the state's interests, the state legislature and other executive agencies have begun to evaluate the function of some of the CHIP enrollment requirements. Some of these requirements have been identified as barriers, and official action has been taken to remedy some of these barriers. By removing the barriers, more families have been able to enroll in Mississippi Health Benefits in the recent past. As more barriers are removed in the next year, the state and many other interested parties are optimistic that enrollment will continue to increase, as will the quality of life for many Mississippians.

IX. THE WAITING PERIOD AS AN ENROLLMENT BARRIER

Title XXI of the Social Security Act requires Mississippi to implement a waiting period to avoid "crowd out." Crowd out refers to the substitution of public health insurance for previously held private insurance. To prevent families from allow-

¹³ G. Simpson et al., *Access to Health Care, Part 1: Children*, in VITAL AND HEALTH STATISTICS (Nat'l Ctr. for Health Statistics, Series 10, No. 196, 1997).

ing their private insurance to lapse in favor of CHIP, Mississippi instituted a six-month waiting period. The waiting period barred the enrollment of a child if he or she was enrolled in a private, creditable health insurance program in the six months prior to application.

The six-month waiting period was not federally required, and it deterred many parents from applying for CHIP. It was seen as a penalty for parents who sacrificed to provide private health insurance for their children. These complaints did not fall upon deaf ears. Recently, the Division of Medicaid was able to obtain a waiver from the Federal Health Care Finance Administration (HCFA) to enroll qualified children who had received private insurance if they were not insured at the time of application. The HCFA waiver is not permanent, and does not guarantee instant coverage through Mississippi Health Benefits. The practical effect of the HCFA waiver in Mississippi allows a child whose private insurance expired yesterday to apply for CHIP today; however, it may take as long as thirty days before the child will have any health insurance.

The HCFA waiver is temporary, and will be recalled if it can be documented that more than 15% of the applicants utilizing the abbreviated waiting period were previously enrolled in private, creditable health insurance programs. This stipulation to the waiver is designed to prevent crowd out as a result of the suspended waiting period.

The HCFA waiver has not alleviated the waiting period as an enrollment barrier completely. Although it is a vast improvement from the six-month waiting period, under the agreement with HCFA, after an application is submitted, a child will be left without any insurance for as long as thirty days or more. Because of this, the application process continues to act as a barrier to CHIP enrollment. However, this barrier is an unavoidable byproduct of the program itself. At its core, CHIP is a program designed to provide insurance for the uninsured, and with that as its goal, it is not foreseeable that this barrier will be removed until the act of processing an application shortens.

X. CHILD SUPPORT VERIFICATION

When an applicant submits his or her application for Mississippi Health Benefits, the application is screened for Medicaid and CHIP, in that order. The fact that Mississippi utilizes a dual-purpose application has its positive attributes, but it also has its detriments. A consolidated application relieves the applicant from having to fill out separate applications for every program. However, one of the detriments in the application process is the fact that the two programs that the application is screened for maintain separate eligibility guidelines. This fact can, and has, led to confusion at the local DHS office and in the home of the applicant.

In determining eligibility for Mississippi Health Benefits, DHS must determine eligibility for Medicaid before CHIP, thus requiring DHS to seek information regarding an absent or non-custodial parent.¹⁴ One of the requirements for Medicaid eligibility is that a child support order must be authorized before an applicant can be considered for approval. Legally, children cannot be denied health benefits as a result of the parent's reluctance to pursue child support. The request for child support information does allow the applicant to refuse to supply this information with "good cause," but many applicants are never made aware of this fact.

When an application is deemed incomplete due to the fact that efforts to seek cooperation with Child Support Enforcement (CSE) have failed, the applicant has traditionally received a generic, boilerplate DHS form notice in the mail. The notice, which does not vary in format from a denial or acceptance notice, states that the application for Mississippi Health Benefits cannot be completed until DHS receives information regarding the non-custodial parent. The notice also states that if the information is not supplied before the thirtieth day of the month in which the application was submitted, the application will be denied.

This requirement of cooperating with CSE has acted as a

¹⁴ MISS. CODE ANN. § 43-13-303 (2000).

barrier to enrollment in two manners. The first example of the requirement acting as a barrier is very elemental. Many people do not want the state investigating their personal lives and relationships. Many applicants do not want the state to have the required information about the non-custodial parent. Reasons for keeping this information from DHS vary. The applicant may be receiving some amount of support, but not the amount ordered by a court, or the applicant and the non-custodial parent may have an amicable relationship that could be threatened by DHS action. Most people are not aware of the "good cause" exception until they schedule a time to meet with their DHS eligibility worker. Another way the child support notice acts as a barrier involves the notice that is sent to the applicant. Many people who have received this notice have simply misunderstood it as a denial notice because the two notices are similar in language, format and appearance.

As of February 21, 2001, a monumental change has taken place involving the child support reporting requirement and its relationship to Mississippi Health Benefits. The requirement that an applicant must cooperate with CSE to pursue child support payments from a non-custodial parent no longer applies except in the case where an applicant is also seeking benefits for himself or herself. Parents or caretakers only applying for Mississippi Health Benefits for children are no longer required to cooperate with CSE. As always, pregnant women applying for health benefits are also exempt from establishing paternity. It is now required that the applicant be told that choosing not to cooperate with CSE will not affect the child's application for Mississippi Health Benefits. Applicants will no longer be referred to CSE unless the applying parent or caretaker specifically requests assistance in establishing paternity or obtaining child support.

XI. DETERMINING INCOME AS A BARRIER

Mississippi Health Benefits is a need-based program. As with other need-based programs, a declaration of income must be made, and eligibility is largely determined based on the amount of income a family receives. Until February 2001, proof of income had to be supplied with this declaration. Proof, such as a receipt or a copy of a paycheck, is required for the

month previous to the month in which the application was made. This requirement was not a barrier for the people whose income is easily determined, such as salaried employees or regular hourly wage earners. The difficulty becomes readily apparent in the case of self-employed persons and seasonal income earners.

Self-employed workers make up a large number of people in Mississippi, and the Mississippi Health Benefits Program is available to them; however, many of these people have found enrollment into the program to be difficult because of the income verification requirement. When a worker is self-employed, proof of the last month's income is difficult to provide. Even more frustrating is the fact that there is not one state-wide approved method of proving your income if you are self-employed. County DHS offices vary on what they will accept as proof of income. Many counties will allow the previous year's tax records to suffice as proof, and some counties will allow other business records to show income. The lack of uniformity throughout the state has troubled advocacy groups and DHS offices alike.

Like self-employed workers, seasonal income earners also encounter difficulty proving their income. The goal of the Mississippi Health Benefits program is to provide health insurance for families whose income falls below 200% of the annual FPL. However, the application asks for proof of the most recent month's income, and this has a devastating effect on the application of the seasonal employee. When a large part of one family's yearly income is yielded in one quarter of that year, it is obvious that those paychecks are much larger than the paychecks from the other months of the year. This is especially prevalent in agrarian families. In Mississippi, many families depend on agriculture for income. Whether it be cotton, soy or shrimp, there are a large number of families that depend on agriculture, and their income can fluctuate greatly with the change of the seasons.

Local DHS offices around the state have treated seasonal income earners in much the same manner that self-employed workers are treated. Depending on the county in which a family resides, they may be able to show tax records and other

supplemental records to increase their likelihood of being deemed eligible for Mississippi Health Benefits. The problems of the seasonal income earners and the self-employed are not exclusive to Mississippi, nor do they go unnoticed. The state has recognized that there are a number of families who would otherwise be eligible for the program, but due to the difficulty they have encountered proving their income, they cannot be enrolled. The Governor's Office, the Division of Medicaid and DHS are taking steps to make it easier for these families to apply for, and become enrolled in, Mississippi Health Benefits.

Providing proof of income can prove to be misleading for hourly or salary-based income earners as well. For some regular income earners, a denial can result from a reported income that exceeds the FPL by a mere dollar. A regular income earner's application can be denied due to a special monetary bonus, overtime hours, or other such irregular pay that, when combined with the earner's regular pay, makes the application ineligible due to the FPL guidelines. During the application process, there is no interview or other opportunity to explain these figures, and they are used to determine eligibility as if they were regular income.

Recently, in February 2001, DHS implemented the opportunity for a self-declaration of income. When a person applies for Mississippi Health Benefits, a reporting of gross income for the legal custodial parents must be made. With this declaration of income, the applicant must provide verification of that income with check stubs or other documents, or in the alternative, the applicant may provide Social Security numbers for the legal custodial parents in the home. The applicant must be informed that if he or she does not want to provide proof of income, the Social Security numbers given will be used for verification purposes. During the application process, the state DHS will then investigate the declaration of income made, and if it is valid, the application process will continue. If the declaration is found to be fraudulent or errant, the application will be denied for lack of an income verification. Practically, this means that seasonal employees and the self-employed will be able to apply for Mississippi Health Benefits without being hindered by the lack of proof of payment. Under the new rule, they can declare their income and Social Security number, and

begin the application process without prejudice.

XII. WHAT IS PRESUMPTIVE ELIGIBILITY?

With the realization that Mississippi's CHIP numbers are low and that the low number of children enrolled in CHIP could be attributed to some of these enrollment barriers, state officials and health care advocates have been trying to determine ways to increase enrollment. To defeat the noted enrollment barriers, Mississippi is preparing to allow a system of presumptive eligibility.¹⁵

Presumptive eligibility is a method of determining eligibility that is designed to increase regular enrollment into Medicaid and CHIP. It is a way for the state to allow certain qualified Medicaid providers and community-based organizations, such as Head Start and WIC, to enroll children in Mississippi Health Benefits immediately, thus alleviating the potential perils of the application process. Presumptive eligibility has been seen as a way to promote health care among uninsured children, as well as a way to protect state CHIP funds from being recalled by the federal government.

The practical application of presumptive eligibility is served when an uninsured child is brought to a qualified entity, to be determined by the state. The child is then screened for an initial determination of eligibility for Mississippi Health Benefits, and if the provider presumes that the child would be eligible for Medicaid or CHIP, medical attention is then provided to the child. The qualified screening entity then sends documentation to the appropriate DHS office alerting it to the presumptive eligibility of the child, and the child's family begins the application process to determine permanent eligibility. During this application time, the child has temporary health coverage until a final decision is reached. If that final decision should find the child to be ineligible for Mississippi Health Benefits, the medical expenses incurred during the presumptive period are covered, and the provider will be reimbursed for medical services rendered. Neither the provider,

¹⁵ H.R. 939, 2001 Reg. Sess. (Miss. 2001).

nor the state, nor Blue Cross Blue Shield will incur any additional expense as a result of an errant presumption of eligibility.

Presumptive eligibility will not remedy all the enrollment barriers associated with Mississippi Health Benefits, but it does allow more children to be insured. It allows the state an opportunity to reach more families than the amount it has been able to reach through prior existing channels. With presumptive eligibility, some barriers are removed. Many barriers associated with the application process are discarded, as well as some of the barriers attributed to the stigma of welfare.

XIII. CONCLUSION

CHIP is a program that is desperately needed and valued in Mississippi. However, if the people that the program is designed to assist are not able to apply, enroll and utilize this program, it is nothing more than a perfunctory attempt to help children and working families. The federal government has identified a need for health insurance. It has made federal dollars available to the states and has provided the states with the opportunity to take care of its residents.

Devolution of government—the identifying mark of block grants—is based upon assumptions. The federal government assumes that the state receiving a block grant is better suited to make an efficient use of the funds. The federal government assumes that the state is closer to the communities to be served with the block grant. However, in order for devolution of government to succeed, the state government and the people of the state must act responsibly and with the best interests of all in mind.

From the time state matching funds were provided gain access to CHIP monies, evaluations have been made. From these evaluations, barriers to enrollment and access have been identified, and the people behind the program have responded. CHIP has evolved, and continues to change as more enrollment barriers are identified. The past year has seen the state move toward a system of presumptive eligibility, and it has seen superfluous enrollment requirements removed. There is always room for improvement, and with community activism and a demand for government accountability, improvements

will continue to be made.

The Balanced Budget Act has created an opportunity for states to reduce the number of uninsured children. The extent to which this opportunity is taken advantage of depends on the state. Mississippi has the chance to ensure quality health insurance for more than 125,000 children. While the number of children already enrolled in the Mississippi Health Benefits has recently increased, satisfaction will not be realized until all of the qualified children know what it is to have health insurance.

HEALTH CARE AND SOCIAL SECURITY UPDATE—2001

*Catherine V. Kilgore**

This presentation provides information about public benefits programs applicable to people residing in Mississippi.

I. MEDICARE

Medicare is a federal health care program that is available to certain groups regardless of financial status. Medicare was enacted in 1965 as Title XVIII of the Social Security Act.¹ Originally, Medicare consisted of only Part A, the hospital inpatient benefit or hospital insurance. Part B, which now covers physician services, outpatient hospital care, physical therapy, ambulance trips, durable medical equipment and prostheses, was later included in the Medicare program. In the past few years some home health benefits were added to Part B.² Social Security offices handle enrollment in Medicare. Application for Social Security disability or retirement benefits is treated automatically as an application for Medicare. Others may enroll during their initial enrollment period, which extends from three months before their sixty-fifth birthday to three months after that date. Those who do not enroll during the initial enrollment period may enroll during the first three months of a subsequent year. Penalties result from late

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¹ The Social Security Act is now codified as amended at 42 U.S.C.A. §§ 301-1397jj (West 1991 & Supp. 2001).

² See generally ALFRED CHIPLIN & WALTER KEENAN, NATIONAL SENIOR CITIZENS LAW CENTER, MEDICARE: A PRACTICE GUIDE (1996).

enrollment.³

A. *Part A Medicare*

Part A Medicare pays for hospital, skilled nursing home and home health benefits. The Part A premium is \$300/month⁴ for those who have less than thirty quarters of Medicare-covered employment and \$165/month for those who have thirty to thirty-nine quarters of Medicare covered employment. Recipients of Social Security Retirement benefits and Railroad Retirement benefits are not charged a premium for Part A benefits.

The hospital Deductible is \$792/benefit period (patient pays first time admitted in the hospital per "spell of illness").

1. *Hospital Benefit*

Days one to sixty in the hospital: After the deductible is paid, Medicare pays 100% for covered charges per "spell of illness."

Days sixty-one to ninety in the hospital: The patient pays up to \$198/day co-insurance. Medicare pays 100% of remaining covered charges, per "spell of illness."

There are an additional non-renewable sixty "lifetime reserve days" that are covered by Medicare and may be used after the ninety days of coverage have been exhausted. However, Medicare coverage for the lifetime reserve days applies only to covered charges remaining after the patient's \$396/day in co-insurance.⁵

A "spell of illness" begins when an individual checks into a hospital or nursing home and continues for sixty days after the individual has been discharged from the institution. If an individual enters a hospital or nursing facility after the end of a spell of illness, the benefits, deductibles and copayments

³ 42 C.F.R. §§ 406.21, 408.22 (2000).

⁴ The Health Care Financing Administration (HCFA), the federal agency that administers the Medicare Program, announces the Medicare deductible, copayment and premium amounts for the coming year in the Fall. The announcement for 2001 is found at 65 Fed. Reg. 62725, 62727, 62733 (Oct. 19, 2000).

⁵ 42 U.S.C.A. § 1395d(a)(1) (West 1992 & Supp. 2001).

once again apply.⁶

2. Nursing Home Benefits

Medicare pays 100% of approved charges for days one to twenty in the nursing home.⁷

The patient pays \$99/day co-insurance for days twenty-one to one hundred.⁸ Medicare covers approved charges in excess of the co-insurance amount for days twenty-one to one hundred.

After day one hundred, Medicare pays nothing for nursing home care. Note: about one-half of all nursing home charges in the United States are paid for by Medicaid.⁹

3. Hospice Benefits

Hospice care is also provided under Part A of Medicare. Hospice care is designed for persons who are terminally ill, with the goal of making the patient and family comfortable rather than providing cure-oriented treatment. Hospice care can be provided for two ninety-day periods and an unlimited number of sixty-day periods. The hospice is reimbursed for all services on a cost-based prospective payment basis which is capped at an annual amount. The beneficiary must be certified by his physician and the hospice medical director as terminally ill (having a six-month or less prognosis and have made a written election (which is revocable)) in order to receive hospice care in lieu of other Medicare benefits. The recipient may pay 5% of the charge for prescription drugs up to \$5.00 per prescription and 5% of the cost of respite care up to a maximum equal to the inpatient hospital deductible, \$792 in 2001.

Hospice care includes skilled nursing care, physical therapy, occupational therapy and speech therapy; medical social

⁶ *Id.* § 1395x(a).

⁷ *Id.* § 1395e.

⁸ *Id.* § 1395e(a)(3).

⁹ NATIONAL TRAINING PROJECT, AARP FOUNDATION, NURSING HOME LAW: TRAINING MODULE 4 (1999).

services; home health aid and homemaker services; physicians' services; counseling services (including bereavement counseling, dietary counseling and spiritual counseling); medical appliances and supplies (including drugs and biologicals); and short term inpatient care (including respite care) in an institutional setting.¹⁰

To be covered, services must be reasonable and necessary for the palliation or management of the terminal illness as well as related conditions and must be consistent with the plan of care.¹¹

B. Part B Medicare

Part B Medicare covers physician services, out-patient hospital care, physical therapy, ambulance trips, durable medical equipment, prostheses and some home health care.¹²

The Part B premium is \$50/month. The Part B deductible is \$100/year. The patient's copayment (out-of pocket expense) is 20%. There is no limit on the number of physician visits and other services provided. Medicare pays an amount determined to be a reasonable charge. Physicians can impose excess charges above the reasonable charge. The current limitation on the excess charges is 115% of the Medicare reasonable charge. Some doctors accept the Medicare approved charge.¹³ These doctors who accept assignment are called participating physicians. Even those doctors who do not elect to become participating physicians can agree on a case-by-case basis to accept assignment.¹⁴

Doctors who choose to opt out of Medicare may enter into private contracts with beneficiaries to provide Medicare-covered services at a rate set by the doctor. In exchange for being able to set their own rate schedules, doctors must agree to give up Medicare payments for all patients for two years after entering into the private fee arrangement. Doctors must also

¹⁰ 42 U.S.C.A. § 1395x(dd)(1).

¹¹ *Id.* § 1395d.

¹² *Id.* §§ 1395k, 1395x.

¹³ *Id.* § 1395w-4(a)(2)(A)(ii).

¹⁴ *Id.* § 1395u(h)(1).

inform beneficiaries that they will not be reimbursed by Medicare or a Medicare supplemental policy for the services they will receive even though the services are covered by Medicare.¹⁵

1. Recent Changes in the Home Health Benefit

Prior to the enactment of the Balanced Budget Act of 1997 by Congress, Medicare home health benefits included an unlimited number of home health visits.¹⁶ Beginning in January, 1998, there is now a prior institutionalization requirement for Medicare coverage of home health benefits, and a one hundred visit coverage limitation per spell of illness. As of January of 1998, home health services may be provided under Part A of Medicare (i) after a discharge from a hospital or rural primary care hospital in which the individual was an inpatient for not less than three consecutive days before such discharge, if such home health services were initiated within fourteen days after the date of such discharge, or (ii) after discharge from a skilled nursing facility in which the individual was provided post-hospital extended care services if such home health services were initiated within fourteen days after the date of such discharge.¹⁷

Additional coverage for home health services which do not meet these Part A coverage criteria and visit limitations are available now under Part B of Medicare.

Another important change brought about by the Balanced Budget Act was a provision that prohibits home health coverage if the sole skilled nursing service needed is the taking of a blood sample. This limitation became effective February 5, 1998.¹⁸

Home health benefits must be provided under a physician's plan of care and are provided through an arrange-

¹⁵ Balanced Budget Act of 1997 (BBA), Pub. L. No. 105-33, § 4507, 111 Stat. 251, 439, 441-42 (1997) (amending 42 U.S.C.A. §§ 1395a, 1395y).

¹⁶ 42 U.S.C.A. § 1395d(a)(3).

¹⁷ BBA § 4611(a)-(f), 111 Stat. at 472-74 (amending 42 U.S.C.A. §§ 1395d, 1395a, 1395x, 1395ff).

¹⁸ BBA § 4615, 111 Stat. at 475 (amending 42 U.S.C.A. §§ 1395f, 1395n).

ment with a licensed home health agency. To qualify, the beneficiary must be homebound. In other words, an individual must have an illness or injury that restricts the ability of the individual to leave his or her home except with the assistance of another individual, an assistive device or a considerable and taxing effort. Additionally, the service must be needed on an intermittent or part-time (rather than continuous) basis (less than eight hours per day and thirty-five or fewer hours per week). The service provided must include skilled nursing care, physical, occupational or speech therapy services, at least on a periodic basis. When the need for a skilled service has been established, the beneficiary can also receive home health aide services on a more frequent basis to assist with hygiene and nutrition at home. Aide services include personal care assistance, as well as light housekeeping and meal preparation. Medical social services, medical equipment and supplies, and certain outpatient services arranged for by the home health agency are also included in the benefit.¹⁹

C. Medicare Choice

The most important change to the Medicare program brought about by the Balanced Budget Act of 1997 was the creation of the Medicare Choice program. Beginning in November of 1999, all Medicare beneficiaries who live in areas where Medicare choice plans are offered have to choose between original Medicare (traditional fee-for-service Medicare) and a Medicare Choice plan. Medicare choice plans include Health Maintenance Organizations (HMOs), preferred provider organizations (PPOs), provider sponsored organizations (PSOs), Medical Savings Accounts (MSAs) and private fee-for-service Medicare. HCFA is required to provide beneficiaries with information about their plans in order to help Medicare beneficiaries make an informed choice. The current ability to disenroll from a plan at any time will be phased out, so that by 2003 beneficiaries will only be able to disenroll from a Medicare Choice Plan within the first three months of the

¹⁹ 42 U.S.C.A. § 1395f(a)(2)(C).

year.

With the exception of MSAs, Medicare Choice plans must provide the same benefits under Parts A and B of traditional Medicare. Beneficiaries who enroll in these plans may experience higher co-insurance amounts than they would if they were in traditional Medicare. Plans may offer supplemental benefits for which they charge a separate premium, though the premiums may be combined with the premium representing the charge for Medicare copayments and deductibles. Beneficiaries may not have the option to decline the supplemental benefits unless the federal regulatory agency (HCFA) determines that offering the benefits without the option to decline them would substantially discourage enrollment in the plan. MSAs cannot offer supplemental benefits to cover the MSA deductible. Plans, other than MSA plans, will be required to pass on to beneficiaries, in the form of additional benefits, any "savings" they achieve because their costs are less than the Medicare payment.

Benefits must be made available and accessible within the plan service area "with reasonable promptness" and in a manner that assures continuity of care. Medically necessary services must be made available and accessible to beneficiaries twenty-four hours a day, seven days a week. Emergency and urgently needed services received outside the plan must be covered. Congress adopted the prudent lay-person standard to define emergency medical care and included severe pain as a symptom indicative of an emergency situation. Plans also must provide beneficiaries with information about their benefits and premiums and about any potential beneficiary liability.

A beneficiary must have both Parts A and B of Medicare in order to enroll in a Medicare Choice plan. Individuals with end stage renal disease are ineligible. Generally, beneficiaries are only eligible to enroll in a Medicare Choice plan that serves the area in which they live. Beneficiaries who are covered by federal employee health benefits plans or plans through the Veterans Administration or the Department of Defense may not enroll in MSAs until the government determines whether MSA enrollment will increase government ex-

penditures and issues policies providing for such enrollment. Similarly, people eligible for cost-sharing under a Medicaid state plan, including QMBs and SLMBs, cannot enroll in an MSA plan. A Medicare Choice plan may not deny enrollment to an eligible individual based on health status or other factors described by the Health Insurance Portability and Protection Act of 1996.²⁰

II. MEDICAID—2001 UPDATE

Medicaid was created in 1965 as Title XIX of the Social Security Act. Unlike Medicare, Medicaid is a welfare program that provides certain health care services to eligible individuals. The program is jointly financed by the federal and state governments, (the federal share is approximately 80% for Mississippi). Medicaid is administered directly by the states. States must follow federal law and regulations in order to participate in the Medicaid program. State Medicaid programs are not universally the same due to a complex statutory scheme.²¹

A. Eligibility Requirements

In Mississippi, eligibility requirements for Medicaid coverage are as follows:

²⁰ BBA, Pub. L. No. 106-544, § 1(a)(6) [Title IV, § 412(a)], 114 Stat. 2763, 2763A-509, -511 (2000) (amending 42 U.S.C.A. § 1395cc-2 (West Supp. 2001)).

²¹ See PATRICIA NEMORE, ESQ., NATIONAL SENIOR CITIZENS LAW CENTER, *MEDICAID AND THE ELDERLY POOR* (1996), for a good discussion of the history and scope of the Medicaid program. The state eligibility information in this section was gathered through a series of telephone calls to the State Medicaid Office eligibility section. Our office has recently obtained a copy of the *Mississippi Medicaid Eligibility Manual*. However, in practice, changes occur often throughout the year in the area of Medicaid and sometimes are in the form of a letter from HCFA to the State Executive Director. As a result, by necessity, information is often gathered in a more informal manner in this area of the law.

*1. Poverty Level Aged and Disabled (PLAD)
Medicaid Benefits*

The Poverty Level Aged and Disabled (PLAD) program of Medicaid benefits includes the fullest range of benefits, including a prescription medicine card and coverage for the gaps in Medicare, for eligible Medicare recipients, among other benefits. Eligibility for this group may begin up to three months before the month of application.

Income/month	Individual	\$1017
	Couple	\$1357
Resources	Individual	\$4000
	Couple	\$6000

Additionally, the State has begun to allow earned income that is irregular to be averaged over a twelve month period.

Currently, Medicaid pays for up to ten prescriptions per month. The recipient can obtain five prescriptions per month without the necessity of pre-approval by Medicaid. An additional five prescriptions per month can be ordered by the recipient's doctor and approval can be obtained for the additional prescriptions above and beyond the first five by the physician submitting the needed information to the Division of Medicaid.

If a physician orders a prescription drug that the pharmacist cannot supply through Medicaid, without approval, the individual can return to the physician and request that the physician call Medicaid to obtain a prior authorization number. Then the doctor can call the pharmacist and give the pharmacist the pre-authorization number.

Medicaid also now pays for a pair of eyeglasses every three years.

2. Qualified Medicare Beneficiary Program (QMB)

QMB includes coverage for those people who are eligible for Medicare Part A, filling the gaps in Medicare benefits for

eligible Medicare recipients, including deductibles, co-insurance amounts and premiums. Prescription medicine is not covered unless given in an institutional setting.

Income/month	Individual	\$ 766
	Couple	\$1018
Resources	No limits	

3. *Specified Low Income Medicare Beneficiary Program (SLMB) for Individuals Who Have Medicare Part A*

SLMB coverage pays for the Medicare Part B premium only (\$50/month in 2001).

Income/month	Individual	\$ 909
	Couple	\$1211
Resources	No limits	

4. *QI-1*

The QI-1 program pays the Medicare Part B premium for those recipients of Medicare Part A whose incomes are between 120% and 135% of the Federal Poverty Level (FPL) (\$50/month in 2001).

Income/month	Individual	\$1017
	Couple	\$1357
Resources	No limits	

5. *QI-2*

The QI-2 benefit pays only a small portion of the Medicare Part B premium, \$2.87/month, in 2000. This benefit is for those individuals with Medicare Part A whose incomes are between 135% and 175% of the FPL. Medicaid will pay this benefit cumulatively at the end of the year.

Income/month	Individual	\$1303
	Couple	\$1744
Resources	No limits	

6. *Working Disabled*

To qualify for full Medicaid with this group a person must:

Be working at least forty hours per month

Be determined disabled

Have monthly income less than:

Earned income:

Individual	\$1740
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Couple	\$2344
--------	--------

Unearned Income:

Individual	\$ 990
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Couple	\$1316
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Have resources less than:

Individual	\$4000
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Couple	\$6000
--------	--------

Many resources are exempt and are not counted in determining eligibility for Medicaid. They include: the home and contingent land if it is or was the person's primary place of residence; income producing property if it produces a net annual return of 6% of the equity value; two automobiles based upon the usage or if the current market value does not exceed \$4500; all household goods; personal property valued at \$5000 or less; burial plots intended for family members; burial funds up to \$3000/individual and \$6000/couple; the value of in-kind support and maintenance for most categories; the general exclusion has been raised from \$20 to \$50; unlimited exclusion of irrevocable burial funds; no resource limits for QMB, SLMB, QWDI, QI-1, QI-2 categories of recipients.

7. *Children*

Grandparents can assist grandchildren in their custody and care by applying for Medicaid for the child(ren). The income of the grandparent will not be counted against the child in the eligibility process. Furthermore, income will not be deemed from parents to pregnant women.

8. *Medicaid and CHIP Coverage*

Children ages one to six whose family income is up to 133% of the Federal Poverty Level (FPL) are eligible for Children's Health Benefits through Medicaid. Children ages six to eighteen whose family income is below the FPL are also eligible for Children's Health Benefits through Medicaid.

The State Child Health Insurance Program (CHIP) is a federal program that provides funding to states to expand health insurance coverage for children in low-income families. The Mississippi Legislature, in response to the federal program, has enacted legislation establishing a CHIP Commission to develop a plan for CHIP. Under Phase I of CHIP, children in Mississippi are currently covered by Medicaid up to 100% of the poverty level to the age of nineteen. Phase II of the CHIP program, a program that is administered by private insurance, expanded coverage to those with an income level of 200% of the poverty level who have no other credible health coverage and who do not participate in phase I. There are no resource limitations for the CHIP Program.

9. *Children Receiving Supplemental Security Income Disability Benefits*

Children (and adults) who have established disability through the Social Security Administration and have qualified for Supplemental Security Income (SSI) benefits are also eligible for Medicaid.

10. *Disabled Children Living at Home*

Disabled children who are living at home may qualify for Medicaid if:

- the child needs nursing home or hospital level of care.
- the child can receive the same level of care at home.
- the cost of caring for the child at home is no more expensive than that of a nursing home or hospital.

Income limits: The child must have no more than \$1590/month for 2001. Resource limits: The child must have

no more than \$3000.

Eligibility is based upon the child's income and resources alone, without counting the income and resources of the child's parents.

The child's eligibility begins with the month he or she is determined to be qualified, which may be up to three months before the month of application.

11. Medicaid Waiver Programs

These programs are designed for certain populations as an alternative to institutionalization in nursing homes or regional centers.

12. Elderly and Disabled Waiver Program

The recipient must be twenty-one years of age or older, SSI or PLAD eligible, and must need assistance with three activities of daily living to qualify. The program provides services to individuals who, but for the provision of such services, would require the level of care provided in a nursing facility. Services offered under this program include additional home health visits beyond the limit of sixty authorized by other Medicaid programs, home delivered meals, homemaker services, institutional respite and adult day care. The recipient must need nursing home level of care. Information about this program is available at the local Area Agency on Aging. This program is administered directly by the Community Long Term Care Division of Medicaid. Case management services are provided by the Area Agencies on Aging. The case management team is composed of a registered nurse and a licensed social worker who are responsible for identifying, screening and completing an assessment on individuals in need of at-home services. The plan of care is then approved by the Division of Medicaid. Clients are visited at least monthly. During the 1999 regular session, the legislature authorized funding that will allow eventual expansion of this program from 2000 to 10,000 slots statewide.

Part of the assessment functions of the Area Agencies on Aging includes providing information to people about the alternatives to nursing facility care.

The income level for this program is 300% of the SSI level or \$1590 in 2001. Resource limits as of July 1, 2000 are \$4000 for an individual and \$6000 for a couple.

13. Assisted Living Waiver

This is a new category pending approval with HCFA. The program is for Forrest, Harrison, Hinds, Lee, Bolivar, Sunflower and Newton Counties.

Individuals age twenty-one or over, living in Level 1 assisted living facilities or personal care homes, needing Nursing Facility level of care, requiring assistance with three activities of daily living (ADLs) or diagnosed with Alzheimer's disease or dementia with two deficits of ADLs will be eligible. The income eligibility level will be 300% of SSI (\$1590 in 2001) and PLAD level of resources (\$4000/individual in 2000). The individual will contribute to cost up to a limit. Services offered will be a wider variety than Home and Community Based Waiver. Examples of services include medication oversight, therapeutic social and recreational programs, personal care services, homemaker services, intermittent skilled nursing services, transportation, attendant call systems and incontinent supplies.

14. Independent Living Waiver Program

A recipient must have an income of no more than 300% of SSI (\$1590/month in 2001). Resources must not exceed \$3000. The program is for neurologically and orthopedically impaired individuals. The program was created to assist severely orthopedically and neurologically impaired individuals to live independently, rather than in a nursing facility, through the services of a Personal Care Attendant. The person must be capable of directing his/her own care and possess some rehabilitation potential.

This waiver is operated through the Department of Rehabilitation Services. Referrals for this program can be made through the Long Term Care Division of Medicaid or through the Department of Rehabilitation Services. The number of people who can be enrolled increases yearly: 450 in 2000; 550

in 2001; 650 in 2002.

15. Mentally Retarded/Developmentally Disabled Program

This program is an alternative to institutionalization for the mentally retarded. Recipients of SSI, TANF and the Medicaid disabled child living at home category are eligible for this benefit. The latter category requires a determination that the child needs institutional level of care and meets the financial requirements of Medicaid and disability determination requirements of the Disability Determination Service. All individuals must be certified by a Diagnostic and Evaluation team at a retardation center. The process of evaluation is the same as it would be if the individual were going to be admitted to the institution. The program offers personal care aide; in-home respite (relief for the care giver); group home respite; ICF/MR Respite; physical therapy; occupational therapy; speech, language and hearing services; residential habilitation; day habilitation (teaching of habilitation skills, i.e. socialization and grooming skills); pre-vocational services and supported employment. Referrals for this program can be made through the Long Term Care Division of Medicaid, the Bureau of Mental Retardation or the waiver case managers located at each of the Regional ICF/MRs. The program is operated through the Department of Mental Health, Bureau of Mental Retardation.

16. Spinal Cord and Traumatic Brain Injury Program

In 1999, the legislature authorized the development of a waiver program under the Department of Rehabilitation Services to provide services to individuals with spinal cord and traumatic brain injuries. The authorization for this program was part of Senate Bill 2143 that was vetoed by the Governor. The veto was overridden in the year 2000 by the legislature.

The Department of Rehabilitation Services has requested that Medicaid seek a waiver with HCFA for this program. It will be administered by the Department of Rehabilitation

Services.

17. Managed Care in Mississippi

More than 50,000,000 Americans are now enrolled in Health Maintenance Organizations (HMOs). Approximately 75% of those who get health insurance benefits from employers are getting it through managed care.

Women and children who are determined eligible for Medicaid by the Mississippi Department of Human Services (DHS) are enrolled in a managed care program called HealthMACS in all counties in Mississippi.

All women and children determined eligible for Medicaid must enroll in HealthMACS. HealthMACS offers the same services as regular Medicaid. Each recipient is assigned a Primary Care Provider (PCP) who serves as a "gatekeeper physician." In order for the recipient to obtain many medical services, such as access to a specialist, the "gatekeeper" physician must make a referral. Services that do not require PCP referral include: family planning, dental, psychiatry, ophthalmologists, optometrists, eyeglasses, podiatry and Perinatal High Risk Management. The PCP must either provide Immunizations and EPSDT or make a referral to a public health provider. There is no limit on the number of PCP changes that a patient can make. Recipients with special health care needs already receiving services from a specialist are not required to participate in the HealthMACS program. Those recipients can remain in regular Medicaid. Participants in the CHIP II program do not participate in HealthMACS. Blue Cross/Blue Shield administers that program.

The Division of Medicaid does not currently contract with HMOs to deliver services to other categories of Medicaid recipients.

Medicaid recipients who are denied services have appeal rights in regard to denial of service. The appeals process will be explained in material given to the recipients when they enroll with an HMO.

As of September, 2000, there is one Medicare HMO operating in Mississippi.

18. Medicaid Requirement for Nursing Home Residents

To qualify for Medicaid coverage of nursing home care, an individual must be age sixty-five or older, blind or disabled. A physician must certify that the nursing facility level of care is needed. The nursing home must be a qualified Medicaid provider. The individual must also meet income and resource guidelines.²²

19. Income Eligibility Guidelines

Income: \$1590/month in 2001.²³ Note: If an individual's income exceeds \$1590/month the excess income can be placed in a trust in order to qualify the individual for Medicaid. The amount placed in trust will be paid to the State for reimbursement of Medicaid payments for nursing facility care made on behalf of the individual during his lifetime.

The individual must pay all of his income to the nursing home except for amounts allowed to be deducted. These are:

- Personal needs allowance (\$44/month in 2000), \$88/month if resident is earning income. The limit for earned income outside the facility is \$212/month as of July 1, 2001;
- Family maintenance allowance (spousal allowance); and
- Medical expenses not subject to third party payment.

Medicaid pays the difference between the patient's share and the Medicaid rate.

The income of the spouse of the nursing home resident (community spouse) does not affect eligibility for Medicaid coverage for the nursing home resident. The "community spouse" is allowed to receive the income of the spouse in the nursing home in an amount that will bring the community spouse's income up to \$2175 month.²⁴

²² 42 U.S.C.A. §§ 1382-1382k (West 1992 & Supp. 2001).

²³ See *id.* § 1396a(a)(10)(A)(ii)(V).

²⁴ *Id.* § 1396r-5(d)(3); see NSCLC *Washington Weekly*, Vol. XXVI, No. 47 (December 1, 2000, p.187).

20. Resource Guidelines

The spouse in the nursing home is limited to \$4000. The "community spouse" may have resources up to \$87,000.

Many resources are exempt, meaning they are excluded from the resources considered by Medicaid in its eligibility determination. The exempt resources include, among other things, the homestead of any value; household possessions; two vehicles based upon usage, or current value not exceeding \$4500; family burial plots; and a burial fund up to \$3000. Limits on the value of the automobile and household goods are not applicable when there is a spouse at home. These exempt resources are not counted in the \$87,000 amount that the community spouse is allowed. The community spouse is allowed an additional \$87,000 in 2001.²⁵

III. PROTECTIONS AGAINST SPOUSAL IMPOVERISHMENT

In 1989, Congress amended the Medicaid laws to address the financial problems of the spouses of individuals in nursing homes (community spouses). These laws provide protections to prevent spousal impoverishment when an individual qualifies for nursing home care or Home and Community Based Care.

Income: The community spouse is entitled to a monthly maintenance needs allowance of up to \$2175/month in 2001. This means that the income of the spouse in the nursing home on HCBC can be given to the community spouse to make up the difference between her income and the monthly allowance amount, before payment is made to the nursing home.

Children of divorced spouses are also entitled to a monthly maintenance needs allowance. The allowance can be applied regardless of whether there is a community spouse, as long as there is a dependent.

Resources: The community spouse is entitled to a resource allowance of up to \$87,000 in 2001. A greater amount can be protected through a fair hearing or by court order.

²⁵ 42 U.S.C.A. § 1396r-5(c)(3).

IV. MEDICAID ESTATE RECOVERY

Current law requires that the State of Mississippi attempt to recover from the estate of deceased individuals who were fifty-five or older and received Medicaid assistance, up to the value of nursing facility services, and related hospital and prescription drug services.²⁶ The Division of Medicaid must be notified as a creditor in estate proceedings in these cases. Estate recovery is required by federal law and became mandatory in 1994.²⁷

Estate property includes any real property owned by the recipient in its entirety or by shared ownership. This includes home property and other real estate. The Division of Medicaid will not seek to recover from the estate of an individual to the extent that the Medicaid recipient owns only a life estate in the real property.

Estate property also includes personal property owned by the recipient at death, such as cash reserves, stocks, bonds, automobiles, mobile homes or other property owned in full or in part.

The claim shall be waived by the state:

1. If there is a surviving spouse
2. If there is a child who is under the age of twenty-one years or who is blind or disabled or
3. As provided by federal law and regulations if it is determined by the Division of Medicaid or by court order that undue hardship would result.²⁸

Examples of situations where undue hardship will be found in Mississippi include cases in which the estate subject to recovery is the sole income producing asset of the survivors, such as a family farm, a homestead of modest value or other compelling circumstances. Other compelling circumstances include a situation in which an adult relative has lived in the home of the decedent, depended upon that home for her prin-

²⁶ MISS. CODE ANN. § 43-13-317 (2000).

²⁷ 42 U.S.C.A. § 1396p(b)(1).

²⁸ *Id.* § 1396p(b)(2).

cial place of residence for at least one year before the decedent entered the nursing home and gave care so that the person did not have to enter a nursing home during that year.

The Division of Medicaid also allows \$5000 for funeral and burial expenses to be taken out of the value of the estate if there are no funds already set aside for that purpose.

There are also homestead exemptions which apply to prohibit the Division of Medicaid from claiming against the estate if an heir claims the homestead.²⁹

V. TRANSFER OF ASSETS

A. *Civil Penalty*

Transfers of assets for less than fair market value by an individual or spouse within thirty months of application for Medicaid for nursing home or waived home care services will result in denial of Medicaid coverage during a penalty period.³⁰ The penalty is calculated by dividing the uncompensated value of the assets transferred by a statewide average monthly cost of nursing home care (\$2600/month in 2000). Penalties run from the date of transfer and apply only to Medicaid coverage for nursing home care or waived home health care.

Assets affected include all income and resources of the individual and spouse. Assets include those to which the individual or spouse was entitled but did not receive due to action on their part. Examples of such action are waiving pension income or right to receive an inheritance, not "accepting or accessing" a personal injury settlement, having a tort settlement diverted into a trust or refusing to take legal action to obtain court-ordered support.³¹

Fair Market Value: The care provided by family members is presumed to be free, absent a written agreement made at the time the care was given that compensation is intended.

²⁹ MISS. CODE ANN. § 85-3-33 (1999).

³⁰ 42 U.S.C.A. § 1396p(c).

³¹ See HEALTH CARE FINANCING ADMIN., TRANSMITTAL NO. 64, STATE MEDICAID MANUAL-PART 3-ELIGIBILITY (1994), prepared by the Health Care Financing Administration.

B. Exceptions to Transfer Penalties

Certain transfers are exempt from transfer penalties:

1. Transfer of the home to: spouse, dependent or disabled child; a brother or sister who has an equity interest in the home and was residing in the home for at least a year before the individual's admission to the nursing home; child of the individual who was residing in the home for at least two years prior to the individual's admission and who provided care which allowed the person to live at home rather than in an institution.

2. Transfers to a spouse or to another for the sole benefit of the spouse; transfers from the spouse for the sole benefit of the spouse; transfer to a trust solely for the benefit of the individual's blind or disabled child; and transfers to a trust solely for the benefit of a disabled individual under age sixty-five.

3. Transfers where a satisfactory showing is made to the state that (a) the individual intended to dispose of the assets for fair market value and (b) the assets were transferred exclusively for a purpose other than to qualify for Medicaid, or the transferred assets were returned to the individual.

4. Transfers where applying the penalty would work undue hardship. Hardship criteria includes cases where the applicant has no way to pay, the transfer was not knowingly authorized or the individual assigns rights to recover the transferred asset to the State. At minimum, states must allow hardship waiver if the absence of Medicaid would deprive the individual of medical care so that his life would be endangered or if necessities of life would be denied. The state must provide notice, a hearing process and a separate process for appealing an adverse decision.³²

C. Jointly-Held Assets

An asset held with another person is considered to be transferred when any action is taken that reduces the

³² 42 U.S.C.A. § 1396p(c)(2)(A)-(C).

individual's ownership or control of it. The addition of another name to an account may not necessarily constitute an impermissible transfer, unless that action actually restricts the applicant's rights concerning the property. But, withdrawal of funds by another joint tenant, not considered a transfer in the past, is now viewed as such. Recent regulations concerning joint ownership of bank accounts establish a rebuttable presumption of complete ownership of the joint account by the applicant.³³

VI. VETERANS' BENEFITS AND FACILITIES

Veterans' Homes have been established in four Mississippi cities: Collins, Jackson, Kosciusko and Oxford.

Services: The veterans' homes offer a variety of services including rehabilitation services, pharmacy services, recreational activities, social services, room and board, with meals served in the dining halls or in the resident's room, transportation to and from community activities and medical appointments, physician's services, skilled nursing services and domiciliary care services.

Eligibility: To be admitted to one of the Mississippi State Veterans' Homes, a veteran, the spouse of a veteran who is a home resident or the widow of a veteran must meet the following criteria:

1. Be or have been a Mississippi resident.
2. Have had active duty in the Armed Forces and have been discharged under other than dishonorable conditions (applicant must supply DD Form 214 or equivalent report of Separation from Service); or a spouse of a veteran who is currently a resident in a Mississippi State Veterans' Home. Peacetime veterans will be listed on a separate waiting list and may be admitted if there are no wartime veterans on the waiting lists; however there will not be given preference over a wartime veteran. The veteran must be in need of nursing home care.

³³ See *id.* § 1396p(c)(3); 20 C.F.R. §§ 416.1201, 1208.59 (2001); 59 Fed. Reg. 27985 (May 31, 1994).

3. Have had a medical examination by a personal or VA Physician within thirty days of admission request and, as a result, demonstrate that he/she:

- a. Does not have a communicable disease;
- b. Does not require medical or hospital care for which the Home is not equipped or staffed to provide;
- c. Does not have violent traits which may prove dangerous to the physical well-being of other residents, employees or the veteran.

A. Admission

Applications for admission to the Mississippi State Veterans' Homes may be obtained from the county Veterans' Service Officers, the Homes or the Veterans' Affairs Board (the Board). The completed application should be sent to the first choice home. The Admission Committee at each Home reviews the application, and a member of the social work staff will contact the applicant's family to arrange admission. At the time of approval, if there are no spaces available in the applicant's home of choice, he or she may choose to be admitted to an alternate home or placed on a waiting list until space becomes available.

B. Financial Arrangements

A portion of the cost of care in a Mississippi State Veterans' Home is covered by the VA with the balance being paid by the veteran or by his/her family, from available funding sources, such as military or civilian retirement, VA compensation or non-service connected pension, Social Security or personal funds. Indigent veterans may qualify for financial assistance in paying for their care from the Board.

VII. HILL-BURTON HOSPITALS

A. Community Service Obligation

Through the Hill-Burton Act, the federal government provided more than one billion dollars in grants and loans to nearly 7000 hospitals and other facilities throughout the coun-

try. In return, the hospitals receiving Hill-Burton funds provided assurance that a reasonable volume of free or below-cost services would be made available to those unable to pay. The basic community service obligation of Hill-Burton facilities is to make medical services available to all persons in the area. A list of the facilities in the Mississippi area that are under a Hill-Burton obligation is available from the United States Department of Health and Human Services.

VIII. SOCIAL SECURITY UPDATE—2001

The federal social security benefit increased by 3.5% for benefits paid in 2001. The average retirement benefit increased to \$845 in 2001.

The annual exempt amount of earnings for Social Security in 2000 is \$840/month for retirees under age sixty-five and unlimited for retirees above age sixty-five.

After the retiree has earned the exempt amount, for additional earnings: \$1 of benefits is lost for \$2 of earnings if the retired worker is under sixty-five.

IX. SUPPLEMENTAL SECURITY INCOME—2001

The Supplemental Security Income (SSI) benefit for 2001 is as follows:

Individual	\$530/month
Couple	\$796/month

SSI is a federal welfare benefit available for individuals who are age sixty-five or above or who are blind or disabled, whose income and resources do not exceed the benefit amount and whose non-exempt resources do not exceed \$2000 for an individual or \$3000 for a couple.³⁴ Exempt resources, which are generally the same as those described in the Medicaid update, do not disqualify an individual or couple for SSI.

In Mississippi, an individual who is eligible for SSI is also eligible for Medicaid.

³⁴ Sources of the law for the SSI program are: 42 U.S.C.A. § 1381-1385 (Title XVI of the Social Security Act); 20 C.F.R. § 416 (2001); *see also* 20 C.F.R. §§ 401, 404, 422, 423 (Social Security Rulings (SSRs) and Acquiescence Rulings (ARs) and Program Operation Manual System (POMS)).

Many states provide individuals receiving SSI with a monthly state cash assistance payment to specific groups of SSI recipients. Mississippi does not have a state cash assistance program.

To meet the non-financial guidelines for SSI, an individual must prove that he is (1) age sixty-five or older;³⁵ (2) blind, as defined by the Social Security disability standards;³⁶ or (3) disabled, according to the Social Security disability standards.³⁷ Most non-citizens are barred from receiving SSI.³⁸ Residency in the United States is required.

SSI may be received as a person's only income or may be received in addition to another source of income, such as Social Security. SSI is a guaranteed minimum income amount for the aged, the blind and the disabled. Unlike the Social Security Programs, SSI benefits are not paid to dependents or survivors.

Social Security and SSI are different benefits, but both programs are administered by the Social Security Administration.

SSI is a welfare program. Social Security is an insurance program funded by contributions of employers and employees to payroll taxes. Eligibility for Social Security disability, retirement benefits and benefits for dependents and survivors of workers depends upon whether a worker met the insured status test. Social Security retirees are eligible for Medicare at age sixty-five. Individuals receiving Social Security Disability

³⁵ 20 C.F.R. § 416.801.

³⁶ *Id.* § 416.981.

³⁷ *Id.* § 416.905.

³⁸ See Noncitizen Benefit Clarification and Other Technical Amendments Act of 1998, Pub. L. No. 105-306, 112 Stat. 2926 (1998) (grandfathering permanently into the SSI program noncitizens who were receiving SSI prior to August 22, 1996); Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) (restoring SSI eligibility to some classes of non-citizens); Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (eliminating non-citizens from SSI eligibility with some exceptions).

become eligible for Medicare after receiving disability benefits for twenty-four months.

Applications for Social Security and SSI must be in writing and must be made to the local District Social Security Office.

X. SOURCES OF INFORMATION ON SERVICES FOR THE ELDERLY,
HEALTH CARE, SOCIAL SECURITY BENEFITS
AND RELATED TOPICS

A. State and Federal Agencies

For Information on services available to the elderly:

AREA AGENCIES ON AGING:

Central:

Telephone: 601-981-1511 or 1-800-315-3103

Service area: Copiah, Hinds, Madison, Rankin, Simpson.

East Central:

Telephone: 601-683-2401 or 1-800-264-2007

Service area: Clark, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Scott, Smith.

Golden Triangle:

Telephone: 601-325-3855 or 601-323-2636

Service area: Choctaw, Clay, Lowndes, Noxubee, Oktibbeha, Webster, Winston.

North Central:

Telephone: 662-283-2675 or 662-283-2771

Service area: Attala, Carroll, Grenada, Holmes, Leflore, Montgomery, Yalobusha.

North Delta:

Telephone: 662-561-4100 or 1-800-844-2433

Service area: Coahoma, Desoto, Panola, Quitman, Tallahatchie, Tate, Tunica.

Northeast:

Telephone: 662-728-7038 or 1-800-745-6961

Service area: Alcorn, Benton, Marshall, Tippah, Tishomingo.

Southern:

Telephone: 228-868-2311 or 1-800-444-8014

Service area: Covington, Forrest, George, Green, Hancock, Harrison, Jackson, Jefferson Davis, Jones, Lamar, Marion, Pearl River, Perry, Stone, Wayne.

South Delta:

Telephone: 662-378-3831 or 1-800-898-3055

Service area: Bolivar, Humphreys, Issaquena, Sharkey, Sunflower, Washington.

Southwest:

Telephone: 601-446-6044 or 1-800-338-2049

Service area: Adams, Amite, Claiborne, Franklin, Jefferson, Lawrence, Lincoln, Pike, Walthall, Wilkinson.

Three Rivers:

Telephone: 662-489-2415 or 662-489-6911

Service area: Calhoun, Chickasaw, Itawamba, Lafayette, Lee, Monroe, Pontotoc, Union.

Mississippi Department of Human Services:

Telephone: 1-800-354-6347

Division of Aging and Adult Services:

Telephone: 1-800-948-3090 or 601-359-4929.

ASSISTANCE ON CONSUMER FRAUD:

Mississippi Attorney General

Consumer Protection Division:

Telephone: 1-800-281-4418

FOR MEDICAL INSURANCE COUNSELING/INFORMATION:

Area Agencies on Aging and Division of Aging and Adult Services (listed above)**North Mississippi Rural Legal Services (NMRLS)**

Telephone: 1-800-898-8731 or 662-234-8731

NMRLS has a legal hotline for general elder law advice and referral and MsMAPP counselors (Medicare and Medicaid fraud and abuse counseling program).

Mississippi Insurance Commission

Telephone: 1-800-562-2957 or 601-956-0372

DHS/Division of Aging and Adult Services (DAAS)

Telephone: 1-888-240-7539

DAAS has two insurance counseling programs: MICAP-Mississippi Insurance Counseling and Assistance Program and MsMAPP-Mississippi Medicare Assistance Patrol Project (to address Medicare and Medicaid fraud and abuse questions).

FOR VETERAN'S INFORMATION:

The Department of Veterans Affairs

1600 E. Woodrow Wilson Ave.

Jackson, MS 39216

Telephone: 1-800-827-1000.

TO REPORT ELDER ABUSE, FRAUD AND/OR NEGLECT:

Telephone: 1-800-222-8000, or

contact your local Department of Human Services Office
or

Attorney General Medicaid Fraud Control Unit

To report abuse or neglect in the nursing home, personal care home or hospital, call 1-601-359-4220.

NATIONAL ELDERCARE HOTLINE:

Eldercare Locator:

Telephone: 1-800-677-1116

A nationwide directory assistance service to help older adults and caregivers locate local support services.

ORGANIZATIONS:

Alzheimer's Association

919 North Michigan Ave., Suite 1100

Chicago, Illinois 60611-1676

Telephone: 1-800-272-3900

website: <http://www.alz.org>

National Senior Citizens Law Center, Washington Office

1101 14th St., N.W.

Suite 400

Washington, DC 20005

Telephone: 202-289-6976

National Senior Citizens Law Center, Los Angeles Office

3435 Wilshire Blvd.

Suite 2860

Los Angeles, CA 90010

Telephone: 213-639-0930

website: <http://www.nslc.org>

National Organization of Social Security Claimants' Representatives (NOSSCR)

1101 Vermont, N.W.

Suite 1001

Washington, D.C. 20005

Telephone: 202-216-0030

website: <http://www.NOSSCR.org>

Mississippi Health Advocacy Program

Post Office Box 11837

Jackson, MS 39283-1837

Telephone: 601-982-2990

website: <http://www.mhap.org>

Medicaid websites:

<http://www.hcfa.gov>

<http://www.dom.state.ms.us>

Medicare:

Health Care Financing Administration

Website: <http://www.hcfa.gov>

Palmetto Government Benefits Administrators

Regional Home Health Intermediary

Telephone: 1-727-773-9225 or 1-800-447-8477

Palmetto Government Benefits Administrators

Durable Medical Equipment

Telephone: 1-727-773-9225 or 1-800-447-8477

TriSpan (Blue Cross Blue Shield)

Medicare Part A Intermediary

Telephone: 1-800-932-7644 or 601-932-3704

United Health Care/Medicare Part B Carrier

Telephone: 1-800-682-5417 or 601-956-0372

Information on Social Security:

<http://www.ssa.gov>

<http://www.NOSSCR.org>

Railroad Retirement Board

Telephone: 1-800-833-4455

For more information contact Catherine V. Kilgore, North Mississippi Rural Legal Services, P.O. Box 767, Oxford, MS 38655. 1-800-898-8731.

COMMENTS

What's in a Wage? The Living Wage Movement and the Effect of a Living Wage on a Minimum Wage Family

Across the country, various groups have started a nationwide living wage movement targeted at business interests and local governments to encourage payment of higher wages. These efforts have focused variously on establishing wage standards on contractors who bid for public contracts, imposing conditions on economic development funds or requiring an increase in the statutory minimum wage.¹ Proponents of the living wage argue that higher pay for workers will expand the local tax base as disposable income increases in the area, provide a better quality of life for laborers, save money by reducing the amount of transfer payments and other government benefits, and that it is an inherently fair policy.² Oppo-

¹ The New Party, *The Living Wage Campaign*, at <http://www.newparty.org/livwag/livwag.html> (last visited Mar. 14, 2001). Over forty living wage ordinances have been enacted since Baltimore passed the first such ordinance in 1994. Jill Jenkins, *The Unintended Consequences of "Living Wages"*, FACT & FALLACY (Employment Policy Found., Washington, D.C.), Nov. 23, 1999, <http://www.epf.org/ff/ff991123.htm>. The vast majority of these mandates have focused on requirements imposed on local employees and businesses who contract with local government. *Id.* The wage requirements vary from a low of \$6.22 per hour without additional benefits in Buffalo, N.Y. to a high of \$11.25 per hour in New York City. *Id.*

² Association of Community Organizations for Reform Now (ACORN), *Intro-*

nents of the living wage counter that higher wages will cost jobs and cause businesses to relocate.³

In recent years, the living wage movement has gathered steam in Oxford, Mississippi. Although still in its infancy, the participants in the Oxford branch of the campaign include students and faculty of the University of Mississippi, with support from some faith-based institutions.⁴ The local campaign is patterned after the living wage movements in other university towns, such as the efforts at Harvard University and Johns Hopkins University.⁵ The work done in Oxford to date includes community meetings at area churches and a concerted effort to disseminate information through the local media, with both drives aimed at raising public awareness about the living wage.⁶

One attempt at defining a living wage resulted in the following: "compensation for labor paid . . . sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare."⁷ Welfare, in the

duction to ACORN's Living Wage Web Site, in LIVING WAGE RESOURCE CENTER, <http://www.livingwagecampaign.org/introcontent.htm> (last visited Mar. 14, 2001). Proponents also argue that employees have higher job satisfaction and are better workers when they are paid a living wage, resulting in reduced labor costs for businesses. AFL-CIO DEPT OF PUB. POLICY, LIVING WAGE LAWS: ANSWERS TO FREQUENTLY ASKED QUESTIONS (Oct. 2000), at http://www.aflcio.org/articles/minimum_wage/index/pdf. Proponents also refute the argument that higher wages will force businesses to relocate, insisting instead that the majority of low-wage jobs are in the transportation, food or janitorial fields and must be located near their customers. *Id.*

³ Jenkins, *supra* note 1. Opponents cite a Burkhauser, Couch and Wittenburg study finding that a \$10 mandatory wage would result in the loss of 9.2 percent of the employment opportunities available to adults. *Id.* They also argue that even if firms are not able to relocate, higher labor costs may force owners to abandon their enterprises. *Id.*

⁴ Telephone Interview with Byron D'Andrea Orey, Assistant Professor of political science and African-American studies at the University of Mississippi (Mar. 20, 2001) [hereinafter Orey Interview]. Dr. Orey cited the Nation of Islam and the Catholic Church as the institutions most involved in the campaign. *Id.*

⁵ *Id.*; see also HARVARD UNIVERSITY, THE HARVARD LIVING WAGE CAMPAIGN, at <http://www.hcs.harvard.edu/~pslm/livingwage/portal.html> (last visited Mar. 5, 2001); JOHNS HOPKINS UNIVERSITY, THE LIVING WAGE CAMPAIGN AT JOHNS HOPKINS, at <http://yukiok.soc.jhn.edu/neoslac/law/front.htm> (last visited Mar. 5, 2001).

⁶ See Orey Interview, *supra* note 4.

⁷ WIS. STAT. §§ 104.01(5), (9) (1996); WIS. ADMIN. CODE § 72.001, *et seq.*

context of the above definition, was to include "reasonable comfort, reasonable physical well-being, decency and moral well-being."⁸ Another description, seemingly more tangible but actually just as amorphous, states that a living wage is "a wage that will allow the workers involved not to just subsist, but to live in reasonable comfort and to have a little bit left aside as disposable income."⁹

Certainly some of the difficulty in accurately describing the living wage arises from the differences of opinion between people as to what constitutes an actual need as opposed to a want, let alone defining "reasonable comfort." Determining what housing arrangements are "reasonable" is, of course, a subjective matter. As a result, personal views and judgments play a large part in any attempt to quantify a living wage for a particular location.¹⁰

In Professor Deborah Bell's poverty law class at the University of Mississippi School of Law, students participated in a two-part assignment in an effort to come up with a living wage for workers in Oxford. The first part of the assignment was an in-class discussion to determine what items were necessary for a family of four living in Oxford to have "a bare, minimum decent standard of living."¹¹ The focus of the project was a family of four, with both parents employed and with an eight-year-old girl and three-year-old boy.

The class easily reached a consensus on certain items to be included in the family budget, but disagreed on others. For example, the class agreed that medical insurance and a reliable automobile were necessities, but argued initially over whether air conditioning should be available to the family.

(1996). See generally J.M. Spectar, *Pay Me Fairly, Kathie Lee! The WTO, The Right to a Living Wage, and a Proposed Protocol*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 61, 62 (2000).

⁸ WIS. STAT. §§ 104.01(5), (9) (1996).

⁹ BUREAU FOR WORKERS' ACTIVITIES, INT'L LABOUR ORG., at <http://www.maquilla.com> (last visited Apr. 6, 2001).

¹⁰ In each of the four classes in which students have participated in this exercise, the class has arrived at a need between \$2300 and \$2800 per month. Interview with Professor Deborah Bell, Professor of Law, University of Mississippi School of Law (Mar. 21, 2001).

¹¹ *Id.*

However, the class ultimately decided that the family would probably be required to live in an apartment complex with a central cooling system, and air conditioning would not be optional.¹²

Other items that provoked debate were recreation and entertainment expenses. The class agreed that the family should have a television and a VCR as an inexpensive form of entertainment. Cable and satellite television were rejected as entertainment options because of relatively high startup and monthly costs, and doubtless because some members of the class continued to rely upon over-the-air signals for television. The class included in the family's budget an amount for Christmas and birthday presents, but did not allow for graduation or wedding presents for family and friends. The class also rejected tithing and other charitable contributions as a budget expense, and the class did not reserve a place in the family's monthly budget for long-term savings.¹³

The next phase of the class assignment consisted of each student going out into the community to determine the cost of the agreed-upon items. The students returned to report their findings to the entire class. The students then added each cost together to determine what dollar amount would constitute a living wage in Oxford.

The results of the student investigation of the family's typical monthly expenses are as follows:

Housing - \$757¹⁴

¹² Moreover, housing in twenty-first century Mississippi is not designed in the same manner as it was in the pre-climate-controlled era, when houses had higher ceilings and air could flow through the structure more easily.

¹³ Charitable giving (mostly to local churches in the form of a ten percent tithe) is deeply ingrained in Mississippi's culture. Indeed, Mississippi, one of the nation's poorest states, routinely ranks among the top five states in the nation in per capita charitable giving and was number one in the last year (1998) for which data is available. The Baltimore Giving Project, *Ranking of States in Charity Survey*, in BGP NEWS & EVENTS (2000), at http://www.baltimoregivingproject.org/newsletter2351/newsletter_show.htm?doc_id=41637. Giving is not limited to charities in southern culture; many families in Mississippi include in their budget money for graduation, wedding and baby shower gifts to friends and family.

¹⁴ Housing costs includes utilities. An all-electric apartment (three bedrooms, one bath) was available for \$500, with water and sewer included. An average

Medical - \$116¹⁵
Clothing - \$158¹⁶
Food - \$569¹⁷
Daycare - \$144¹⁸
Preschool - \$275¹⁹
Automobile - \$325²⁰
Discretionary - \$160²¹

monthly electric bill was estimated at \$217. Basic phone service cost approximately \$21, excluding taxes (an additional \$9); monthly housing cost also allowed for long distance charges in the amount of \$10.

¹⁵ Medical costs were those imposed by a locally available group insurance program. Insurance could be provided for both the mother and the father through work at no cost, while one of the parents could add both children for \$140 per year. The deductible for the local plan is \$450 per year. An additional \$800 per year was allotted for visits to an eye doctor and a dentist, and for two pair of glasses.

¹⁶ With this amount, the family over the course of the year could purchase an entire wardrobe for each family member. All purchases would occur at retail stores like Wal-Mart, Old Navy, Payless Shoe Source, etc.; charity clothing was not included. The total yearly cost breaks down as follows: father - \$542.63; mother - \$395.08; daughter - 497.84; and son - 338.66. Total costs included 7% Mississippi sales tax.

¹⁷ Food expense is from an Official USDA Food Plan, the Low-Cost Monthly Plan. Prices in this plan are based on 1977-78 data and are indexed for inflation. The USDA figures assumed that all meals and snacks were purchased at stores and prepared at home. USDA CTR. FOR NUTRITION POLICY & PLANNING, OFFICIAL USDA FOOD PLANS: COST OF FOOD AT HOME AT FOUR LEVELS, <http://www.usda.gov/cnpp/using3.htm> (last visited Feb. 9, 2001).

¹⁸ Price based on cost of Oxford daycare.

¹⁹ Price based on cost of Oxford preschool.

²⁰ Oxford has no public transportation system. As a result, our family's budget included the costs associated with a reliable used car. The monthly note on a 1991 Pontiac sedan purchased from an Oxford dealer totaled \$180 (when financed over twenty-four months at 18%). A license plate cost \$27 annually. Total yearly cost for maintenance (including oil changes, tire rotation, brakes, etc.) was \$398. Mississippi's minimum automobile liability insurance statute requires a policy with a \$180 bi-annual premium (assuming a good driving record). Gasoline costs were estimated at \$80 per month.

²¹ Discretionary spending included a number of items, including toiletries and entertainment expenses for the entire family. The class allotted \$80 per month for bathroom items, kitchen equipment, cleaning supplies, etc. A mouthpiece and proper athletic shoes are the only pieces of equipment not provided by the city of Oxford for organized sports; cost for the equipment for both children was \$34 per year. A medical examination is required of each child, costing \$30 per year. The discretionary amount also included \$99 for a video cassette recorder as an inexpensive form of entertainment. Another \$180 per year was budgeted for miscella-

Total - \$2504

A family of four needs a net income of \$2504 per month to have what this class determined to be a minimum standard of living. To receive a net income of this amount, the family needs an annual gross income of approximately \$33,900.²² This breaks down into an hourly wage of approximately \$8.15 for each parent.²³

The 2000 federal poverty level for a family of four is \$17,050.²⁴ The parents in our hypothetical family, both earning minimum wage,²⁵ would have an annual income of \$21,424, which is just under 133% of the federal poverty level.²⁶ After taxes and social security deductions, the family's monthly take-home pay when earning minimum wage would be approximately \$1550, or nearly \$1200 per month less than the students' estimate of a living wage.²⁷

Though not considered poor by the federal government, the hypothetical family earning minimum wage would be eligible for several public assistance programs to supplement

neous entertainment expenses (taking the family out to a movie, ballgame or dinner once every two months). One large ticket item included in the discretionary budget was \$400 per year for birthday and Christmas gifts for the immediate family.

²² Amount before deducting applicable Mississippi and federal income taxes.

²³ Before withholding taxes; assumes fifty-two weeks per year, forty hours per week of work.

²⁴ JOINT CTR. FOR POVERTY RESEARCH, WHAT ARE THE 2000 POVERTY GUIDELINES?, at http://www.jcpr.org/faq/measures_guidelines.html (last visited Mar. 2, 2001).

²⁵ Congress set the minimum wage at \$5.15 per hour after September 1, 1997. Fair Labor Standards Act of 1938, 26 U.S.C. § 206 (a)(1) (2000).

²⁶ The minimum wage, while enough to keep a family of four with two working parents above the federal poverty line, is not enough to keep single parents out of poverty. A full-time working parent of two children earning minimum wage would have a total net income of \$13,781 annually, or almost \$3300 below the federal poverty level. AFL-CIO DEP'T OF PUB. POLICY, *supra* note 2. However, a family over 100% of the federal poverty level may not truly be out of poverty; the federal government seemingly concedes this point by offering subsidies such as the Children's Health Insurance Program to families with incomes as high as 200% of the poverty level.

²⁷ The hypothetical family, which would fall almost \$1200 short each month of the class' living wage, would not be considered "poor" according to the national poverty guidelines. See *supra* note 25 and accompanying text.

their income. The following is a list of the applicable programs and a short description of each.

TANF—TEMPORARY AID TO NEEDY FAMILIES

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 program was signed into law in August 1996, ending federal entitlement to monetary assistance.²⁸ TANF replaced the Aid to Families with Dependent Children (AFDC) entitlement program, and operated to give states block grants and the authority to run their own programs.²⁹ TANF gives states the flexibility to design their programs in a manner that promotes work and strengthens families.³⁰ For example, almost all recipients of TANF assistance must work after two years on assistance.³¹ Work can include actual employment, job training or providing childcare for the children of others on assistance.³² Unmarried minor parents must live with an adult or in a supervised setting in order to participate in the TANF program.³³ Most families are eligible for TANF assistance for only five cumulative years.³⁴ In Mississippi, the maximum benefit for a family of four is \$194 per month.³⁵

FOOD STAMP PROGRAM

The Food Stamp Program provides households with coupons that work like cash so that the family will be able to purchase groceries and have a healthy diet.³⁶ Eligible families can have no more than \$2000 in countable resources, and

²⁸ See THE ADMIN. FOR CHILDREN & FAMILIES, DEPT OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, at <http://www.acf.dhhs.gov/programs/region4/tanf.htm> (last visited Mar. 2, 2001) [hereinafter TANF Facts].

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ TANF Facts, *supra* note 28.

³⁴ *Id.*

³⁵ DIV. OF ECON. ASSISTANCE, MISS. DEPT OF HUMAN SERVS., TANF . . . TEMPORARY ASSISTANCE FOR NEEDY FAMILIES, at www.mdhs.state.ms.us/ea_tanf.html (last visited Mar. 5, 2001).

³⁶ USDA, FNS ONLINE, FOOD STAMPS: FREQUENTLY ASKED QUESTIONS, at <http://www.fns.usda.gov/fsp/MENU/faqs/faqs.htm> (last visited Mar. 2, 2001).

net monthly income must not exceed 100% of the federal poverty level.³⁷ Families with children are not restricted by time limits on their eligibility to receive benefits.³⁸ The average household benefit in fiscal year 2000 was \$173 per month.³⁹

CHIP—CHILDREN'S HEALTH INSURANCE PROGRAM

The Children's Health Insurance Program provides subsidized health insurance for children in low-income families.⁴⁰ Families with children and with an income below 150% of the federal poverty level are exempt from any cost-sharing requirements.⁴¹

EITC—EARNED INCOME TAX CREDIT

The Earned Income Tax Credit was first created by Congress in 1975 and was designed to alleviate the tax burden and supplement the earnings of low-income families.⁴² The tax credit is a refundable credit, the amount of which is determined by a family's earnings and number of children.⁴³ The credit was designed to be a reward for work, since only those individuals filing tax returns can qualify.⁴⁴ Another goal of the credit was to encourage pro-family behavior, as workers living with their children receive a greater tax credit.⁴⁵ If the amount of the allowable credit exceeds the family's tax liability, the family still receives a refund from the IRS.⁴⁶ For fami-

³⁷ *Id.*

³⁸ *Id.* The 1996 Welfare Reform Act placed time limits on the benefits received by some unemployed, childless adults. *Id.*

³⁹ DIV. OF ECON. ASSISTANCE, MISS. DEP'T OF HUMAN SERVS., THE FOOD STAMP PROGRAM, at http://www.mdhs.state.ms.us/ea_fs.html/ (last visited Mar. 6, 2001).

⁴⁰ MISS. STATE DEP'T OF HEALTH, CHIP, at <http://www.msdh.state.ms.us/chip/> (last visited Mar. 6, 2001).

⁴¹ *Id.*

⁴² CTR. ON BUDGET & POLICY PRIORITIES, SUMMARY OF A HAND UP: HOW STATE EARNED INCOME CREDITS HELP WORKING FAMILIES ESCAPE POVERTY (1996), at <http://www.cbpp.org/handup.htm> [hereinafter A HAND UP].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

lies with two children, the maximum benefit is \$3556.⁴⁷ The credit is phased out once family income reaches \$28,500.⁴⁸

The maximum amount of benefits available to our hypothetical family when both parents earn minimum wage is approximately \$7324 annually. Due to eligibility for CHIP, the family could add to this figure the amount saved each year on health insurance. The difference between the family's take-home income when paid a living wage and when paid the minimum wage plus government benefits is roughly \$495 per month, or \$5950 per year.

Establishing an exact dollar amount as "the living wage" is a difficult, if not impossible task for two reasons. An obvious problem is that the cost of living varies from one town to the next, let alone one state to another. An even more serious obstacle to consensus is personal opinion: a wage that would provide for one person's "reasonable comfort" might be the next person's "outrageous fortune." The living wage amount reached by the class was not even the unanimous choice of the participating students. However, the students did agree that the minimum wage, whatever else it might be, is not sufficient to keep many families out of poverty.⁴⁹

John D. Shaw

⁴⁷ A HAND UP, *supra* note 42. The maximum credit is available to families with an annual income between \$8890 and \$11,610. *Id.* The credit amount decreases between \$11,610 until income reaches the phase out amount. *Id.*

⁴⁸ *Id.*

⁴⁹ See *supra* note 22 and accompanying text.

Poverty in Mississippi

I. INTRODUCTION

The word "poverty" conveys a sense of desperate economic misfortune and is defined as the condition of being indigent or the scarcity of the means of subsistence.¹ However, as used by the United States Census Bureau, poverty has a very precise meaning. People in poverty are those in families whose monetary income falls below certain thresholds set according to family size and composition.² The poverty thresholds are adjusted annually for inflation using the Consumer Price Index but do not vary geographically.³ For this and other reasons, the official poverty definition has received some criticism.⁴

The National Academy of Sciences (NAS) released a study in 1995 suggesting an alternative poverty measure that would include other important sources of purchasing power such as food stamps and housing subsidies, but deduct from the apparent income of poor families the costs of necessary expenditures for taxes, child care and out-of-pocket medical expenses.⁵ This

¹ BLACK'S LAW DICTIONARY 1189 (7th ed. 1999)

² JOSEPH DALAKER & BERNADETTE D. PROCTOR, POVERTY IN THE UNITED STATES: 1999, at vii (U.S. Census Bureau, Series P60-210, 2000). For example, the poverty threshold in 1999 for a single person under age sixty-five was \$8667. *Id.* at A-4. For a family of four including two related children under eighteen years of age, the poverty threshold was \$16,895. *Id.* If a family's total income is below the threshold, then every individual in that family is considered to be in poverty. *Id.* at vii.

³ *Id.* Also, monetary income is recorded before taxes and does not include non-cash benefits such as food stamps, medicaid, housing subsidies or capital gains. *Id.*

⁴ See, e.g., Marianne Hill, *Do We Need to Change How We Calculate the Poverty Line?*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.) June 1999, at 17. When the official poverty measure was first developed it was assumed that poor families spent one-third of their income on food. *Id.* The poverty thresholds were established by simply tripling the minimum food budgets for a given size family developed by the Department of Agriculture in 1955. *Id.* But much less is spent on food today relative to other necessities such as housing. *Id.* Therefore, if the poverty thresholds were recalculated now, a higher multiplier would be used, and the poverty thresholds and corresponding rates of poverty would be higher. *Id.*

⁵ DALAKER & PROCTOR, *supra* note 2, at xvi. Also, the poverty threshold

and other measures are being studied by the Census Bureau.⁶ However, this paper necessarily relies on the official poverty measure in its discussion of poverty in Mississippi, recognizing that it is a proxy for the more general concept of economic deprivation. In an effort to capture some of the broader meaning of poverty, other concomitants of poverty such as disability, lowered educational attainment, poor housing and special problems of children are covered in a section following the discussion of poverty.

This paper attempts to describe poverty in Mississippi through the use of statistics. It has been written after the 2000 Census, but, unfortunately, before its detailed results have been made available. Consequently, data from the 1990 Census and subsequent annual Current Population Surveys⁷ have been used, and reports based on this data have been relied upon. In a year's time, when the detailed results of the 2000 Census are available, it will be possible to obtain a more accurate and up-to-date picture of poverty in Mississippi, the progress that has been made and the work still left to be done.

would be calculated from a base of necessary consumption that includes shelter and clothing as well as food. *Id.* In addition, thresholds would be adjusted to reflect regional differences in housing costs. *Id.*

⁶ *Id.* Regional differences in housing costs are significant. The NAS measure of the poverty rate for the southern region of the United States was only 11.6% when standardized for comparison purposes as against 13.1% for the official measure of poverty for the South for 1999. *Id.* at xvii. However, overall the NAS measure tended to raise the apparent poverty rate, because for full-time working families, unavoidable expenses for medical care, childcare and social security taxes outweigh non-cash benefits such as food stamps. JOHN ICELAND, POVERTY AMONG WORKING FAMILIES: FINDINGS FROM EXPERIMENTAL POVERTY MEASURES 1 (U.S. Census Bureau, Series P23-203, 1998). The U.S. poverty rate for 1992 would have been 18.1% for the alternative measure as compared to 14.5% for the official measure. Hill, *supra* note 4.

⁷ The Current Population Survey is undertaken by the U.S. Census Bureau through a statistical sampling of 50,000 U.S. households. Survey estimates may differ from a complete census, are subject to sampling and non-sampling error and may not be comparable. DALAKER & PROCTOR, *supra* note 2, at c-2, c-3.

II. POVERTY IN MISSISSIPPI

A. Who are the Poor?

The 1990 Census identified 631,029 persons living in poverty in Mississippi, a poverty rate of 25.2 percent.⁸ Of the total impoverished population, 283,259 or 45 percent had income less than 50 percent of their poverty thresholds and therefore were so far below the poverty line that small adjustments in the definition of poverty would not reclassify their situation.⁹ Of the total population in poverty, 39 percent or approximately 249,000 were children under the age of eighteen and 14 percent or approximately 90,000 were elderly (65 and over).¹⁰ (See Table A). Viewed another way, of those in poverty 412,593 or 65 percent were African-American, while 210,389 or 33 percent were white. For the poor black population, 45 percent were children and 11 percent were elderly, while of the poor white population, 28 percent were children and 21 percent were elderly. Overall, out of a black population of 915,858, a staggering 45 percent were in poverty.¹¹

B. Where are the Poor?

As a percentage of the population, the greatest concentrations of poverty are in the Mississippi Delta and along the Mississippi river in Claiborne, Jefferson and Wilkinson counties. Of the ten counties with the highest poverty rates in 1997, only one—Wilkinson—was outside the Delta.¹² (See

⁸ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, COUNTY AND CITY DATA BOOK 1994, at 303 [hereinafter COUNTY & CITY DATA BOOK].

⁹ U.S. Census Bureau, *Ratio of Income in 1989 to Poverty Level (Mississippi)*, in 1990 U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

¹⁰ U.S. Census Bureau, *Poverty Status by Race and Age (Mississippi)*, in U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

¹¹ *Id.* The poverty rate among whites in Mississippi was 12.9% *Id.* This rate was much worse than the poverty rate across the United States for white non-hispanics. DALAKER & PROCTOR, *supra* note 2, at B-4.

¹² U.S. CENSUS BUREAU, COUNTY ESTIMATES FOR PEOPLE OF ALL AGES IN POVERTY FOR MISSISSIPPI: 1997, tbl.A97-28, at <http://www.census.gov/hhes/>

Figure 1). The Delta has been one of the three most impoverished areas in the United States for the last half century.¹³ Two of the most impoverished outlying counties are Walthall and Noxubee.¹⁴ All of these counties are rural and, except for Walthall, have majority black populations.¹⁵ The counties with the lowest rates of poverty are in Northeast Mississippi, the Gulf Coast counties and in the metropolitan service areas south of Memphis and around Jackson, the Laurel-Hattiesburg area, and Meridian. On the other hand, an analysis of where the poor are most numerous conveys a different impression. Of the ten counties with the largest populations in poverty, only two were in the Delta: Bolivar and Washington. (See Table B). Indeed, the combined impoverished population of more urban Hinds County, and the two Gulf Coast counties of Harrison and Jackson, all three counties with lower poverty rates, was equivalent to the entire poor population of the thirteen Delta counties (approximately 89,000).¹⁶ The dichotomy between rural (sparsely populated) and urban areas is important even for a predominantly rural state such as Mississippi.

www/saipes/stcty/sc97ftpdoc.html (last visited Feb. 16, 2001) [hereinafter COUNTY ESTIMATES].

¹³ (Barely) *Poorest*, SPECIAL REPORT SERIES (Soc. Sci. Research Ctr., Miss. State Univ., Starkville, Miss.), May 1997.

¹⁴ COUNTY ESTIMATES, *supra* note 12.

¹⁵ COUNTY & CITY DATA BOOK, *supra* note 8, at 298, 312.

¹⁶ COUNTY ESTIMATES, *supra* note 12.

Figure 1
1997 Poverty Estimates for Mississippi

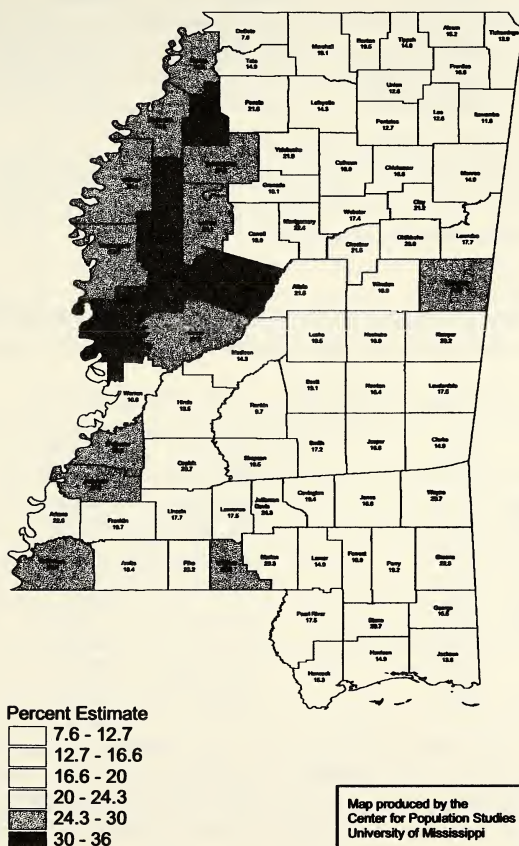


TABLE A: POVERTY IN MISSISSIPPI
BY RACE AND AGE
(numbers/percent of category)

	Total	White	Black
Total	631,029	210,389/33%	412,593/65%
Children	248,705/39%	59,138/28%	186,212/45%
Elderly	90,243/14%	45,027/21%	44,933/11%

*Source: U.S. Census Bureau, *Poverty Status by Race and Age (Mississippi)*, in U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

TABLE B: TEN COUNTIES WITH GREATEST POVERTY
BY RATE AND BY NUMBER OF POOR

By percentage of population		By number of poor	
Holmes	36.0	Hinds	45,188
Sharkey	35.9	Harrison	26,059
Sunflower	34.3	Jackson	17,844
Issaquena	33.2	Washington	17,067
Humphreys	32.0	Lauderdale	13,119
Quitman	31.5	Forrest	13,031
Coahoma	30.0	Bolivar	11,505
Bolivar	29.4	Jones	10,490
Leflore	29.1	Lowndes	10,777
Wilkinson	28.8	Madison	10,463

**Source: U.S. CENSUS BUREAU, COUNTY ESTIMATES FOR PEOPLE OF ALL AGES IN POVERTY FOR MISSISSIPPI: 1997, tbl.A97-28, at <http://www.census.gov/hhes/www/saife/stcty/sc97ftpdoc.html> (last visited Feb. 16, 2001) [hereinafter COUNTY ESTIMATES].

C. How Has Poverty Changed?

Poverty in Mississippi has declined dramatically since the 1990 Census according to the Current Population Survey.¹⁷ The three-year average poverty rate for the years 1997-99 has dropped to 16.8%.¹⁸ Assuming the same overall population for Mississippi as at the 1990 Census, this reduction in the poverty rate represents 216,000 Mississippians leaving poverty. Mississippi no longer has the worst rate of poverty in the nation; Louisiana, New Mexico and the District of Columbia have higher rates.¹⁹ Also, the improvement in the poverty rate since the 1990 Census has been more pronounced in Mississippi than in any of the neighboring states of Alabama, Arkansas, Louisiana or Tennessee.²⁰

At the same time, child poverty has decreased. Between 1993 and 1998 the child poverty rate in Mississippi fell to 21.6%. By comparison, the child poverty rate nationally was 18.7%. Remarkably, 85,000 children in Mississippi left poverty during this time period. At the same time, the Temporary Aid

¹⁷ DALAKER & PROCTOR, *supra* note 2, at xiii.

¹⁸ *Id.* Because this is an estimator based on a small statistical sample, the 90% confidence interval is broad, 14.6% to 19%. *Id.* However, substantiating the large decrease in poverty, there has been a 40% decrease in food stamp program participation between 1995 and 1999. STATE RANKINGS 2000: A STATISTICAL VIEW OF THE 50 UNITED STATES 531 (Kathleen O'Leary Morgan & Scott E. Morgan eds., 11th ed. 2000) [hereinafter STATE RANKINGS].

¹⁹ DALAKER & PROCTOR, *supra* note 2, at xiii. The list relied on reflects the progress made in Mississippi, but cannot be regarded as a true ranking because of the small size of the statistical sample. While Mississippi is forty-eighth on the list, New York is forty-fourth, Texas forty-third and California forty-first, separated by only 1.5% from the Mississippi rate, suggesting that a powerful economy is not a panacea for poverty. *Id.* at xii-xiii.

²⁰ U.S. CENSUS BUREAU, STATE POVERTY RATES AND STANDARD ERRORS: 3-YEAR AVERAGES 1980-82 THROUGH 1997-99, at <http://www.census.gov/hhes/poverty/povanim/pvmaptxt.html> (last visited Feb. 16, 2001). The East South Central region of the United States (Alabama, Kentucky, Mississippi and Tennessee) was the only region in the country where every state enjoyed a decline in poverty between 1988 and 1996. The indexing of social security payments to the rate of inflation and increases in the earned income tax credit contributed to the declines in poverty. *Long-Term Trends: Poverty Declines*, MISSISSIPPI ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), Dec. 2000, at 24.

for Needy Families (TANF) caseload was reduced 75%.²¹

The Current Population Survey does not break down poverty rates by race at the state level, so it can only be hoped that poverty among blacks in Mississippi tracked the overall trend in the state or the nation. Nationally, poverty among African-Americans dropped from 31.9% in 1990 to 23.6% in 1999.²² A comparison of poverty rates in ten majority black counties suggests poverty among blacks did decrease in the 1990s, but to varying degrees.²³ (See Table C). For example, poverty decreased by 18% in Jefferson County (86% black population) between 1990 and 1997.

D. Poverty Stereotypes

There is a conception that people are in poverty because they do not choose to work. However, in Mississippi 53% of the poor are children or the elderly and are not even part of

²¹ NAT'L CTR. FOR CHILDREN IN POVERTY, MAILMAN SCH. OF PUB. HEALTH, COLUMBIA UNIV., FACT SHEET, CHILD POVERTY IN MISSISSIPPI, at <http://cpmcnet.columbia.edu/dept/nccp> (last visited Mar. 6, 2001). The reduction in child poverty was not uniform across the country; for example, California, Texas, New York and several other states experienced large increases in child poverty. NAT'L CTR. FOR CHILDREN IN POVERTY, MAILMAN SCH. OF PUB. HEALTH, COLUMBIA UNIV., CHILDHOOD POVERTY RESEARCH BRIEF 2, CHILD POVERTY IN THE STATES: LEVELS AND TRENDS FROM 1979 TO 1998, at <http://cpmcnet.columbia.edu/dept/nccp> (last visited Mar. 6, 2001). Nationally, welfare caseloads decreased 47% between 1993 and 1998 at the same time as child poverty declined 17%. The connection is not well understood. Some states, for example Oregon, Alabama and Colorado, cut welfare caseloads by half and, as might be expected, experienced no improvement in child poverty. *Id.* In Mississippi, evidence suggests that most families that have left the TANF program have remained in poverty. Marianne Hill, *Where Are They Now? A Look at Welfare Reform*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), Dec. 2000, at 43. Of a sample of 405 adults in eight counties that left TANF in 1998, most earned less than \$2000 in the subsequent year. However, before the 1996 welfare reforms, welfare often acted as a cushion during bouts of unemployment. When TANF was introduced, with its five-year cap on lifetime benefits, the number of women applying for benefits dropped dramatically. It is suggested that these women have turned instead to friends, relatives and private charities. *Id.*

²² DALAKER & PROCTOR, *supra* note 2, at B-4.

²³ Compare COUNTY & CITY DATA BOOK, *supra* note 8, at 303, 317 with COUNTY ESTIMATES, *supra* note 12.

the potential workforce.²⁴ Many poor people work but earn below poverty wages. A full-time minimum wage worker (at \$5.15/hour) does not earn enough to lift a family of three out of poverty.²⁵ Nationally, of all working people over sixteen years of age, 6.1% were in poverty.²⁶ Even for female Mississippi welfare recipients, who were heads of households with children, 50% had worked within the past two years.²⁷

CHANGE IN THE RATE OF POVERTY IN TEN COUNTIES WITH
MAJORITY AFRICAN-AMERICAN POPULATIONS (1990 -1997)

	Percent Black Population ²⁸	1990 Poverty Rate ²⁹	1997 Poverty Rate ³⁰
Bolivar	63	42.9	29.4
Claiborne	82	43.6	28.6
Coahoma	65	45.5	30.0
Holmes	76	53.2	36.0
Humphreys	68	45.9	32.0
Jefferson	86	46.9	28.3
LeFlore	55	38.9	29.1
Noxubee	68	41.1	28.3
Sunflower	64	41.8	34.3
Tunica	75	56.8	26.6

Another conception is that the poor live off government welfare. Although inevitably many of the poor will rely on public assistance, a significant proportion do not. In Mississippi, according to the 1990 Census, 41% of the poor did not receive public assistance income.³¹ Nationally, nearly half the

²⁴ See *supra* note 10 and accompanying text.

²⁵ William P. O'Hare, *A New Look at Poverty in America*, POPULATION BULLETIN (Population Reference Bureau, Washington, D.C.), Sept. 1996, at 11-12.

²⁶ DALAKER & PROCTOR, *supra* note 2, at 18.

²⁷ Marianne Hill, *Welfare Reform: Issues to be Addressed*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), Jan. 1998, at 23.

²⁸ COUNTY AND CITY DATA BOOK, *supra* note 8, at 298, 303, 312.

²⁹ *Id.*

³⁰ COUNTY ESTIMATES, *supra* note 12.

³¹ U.S. Census Bureau, *Aggregate Persons in Households by Public Assistance Income in 1989 (Mississippi)*, in 1990 U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

income of poor adults is derived from wages or other work-type activities.³²

Still another conception is that the vast majority of the poor are African-American and that the largest number of the poor are single mothers and their children. This is a stereotype that is not true nationally, but is unfortunately more accurate for Mississippi. Across the United States, non-Hispanic whites are the most numerous racial/ethnic group in poverty at 48%. African-Americans represented 27% of the poor nation-wide in 1994. Female-headed families comprise just 38% of the poor.³³ However, in Mississippi, African-Americans represent 65% of the poverty population.³⁴ In addition, over 50% of the families in poverty were headed by females.³⁵ Of the female-headed families in poverty, 81% were African-American.³⁶ The vulnerability of women and children in female-headed families is at the core of the poverty problem.³⁷

³² O'Hare, *supra* note 25, at 11.

³³ *Id.*

³⁴ See *supra* note 11 and accompanying text. African-Americans represent 35% of the population of Mississippi. COUNTY & CITY DATA BOOK, *supra* note 8, at 298.

³⁵ COUNTY AND CITY DATA BOOK, *supra* note 8, at 303.

³⁶ U.S. Census Bureau, *Poverty Status in 1989 by Race of Householder by Family Type & Presence & Age of Children (Mississippi)*, in 1990 U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

³⁷ Hill, *supra* note 27, at 24. This is because, for example, the poverty threshold for a family of four including three children under eighteen is \$16,954. DALAKER & PROCTOR, *supra* note 2, at A-4. A female head of household would have to earn \$8.50 per hour working forty hours per week and fifty weeks per year to keep such a family out of poverty, yet the average hourly wage for a black woman working full-time year round in Mississippi according to the 1990 Census was \$5.12 per hour. Marianne Hill, *Wage Trends in Mississippi Industries and Strategies for Raising Wages*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), Aug. 1996, at 18 [hereinafter *Wage Trends*]. The average wage for a white woman was \$6.35 per hour, while for a black man it was \$6.44 per hour. Only the average wage of a white man (\$9.42 per hour) could maintain such a family above poverty. *Id.* The need for childcare while the parent works is yet another problem. The problem is severe across all sectors in Mississippi—20% of women and 10% of men between the ages of thirty and forty-four reported not being able to work at some time because childcare was not available. Marianne Hill, *Working Parents and Childcare in Mississippi*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), June 1999,

III. OTHER CONCOMITANTS OF POVERTY

Disabilities, low educational attainment, poor housing and the special problems of children are both causes of poverty and manifestations of poverty. They are also specific aspects of the poverty phenomenon quite distinct from the condition of simply having low incomes.

A. Poverty and Disability

Chronic health problems which limit or prevent work have serious consequences for the individual and for society. Disabilities affecting the capacity to work lower the productivity of Mississippi's workforce, increase state costs for medical, social and rehabilitative services and can plunge an individual or a family into poverty. Indeed, the character of a labor force depends more on the physical capabilities of potential workers than it does on literacy or educational attainment.³⁸ A work disability is defined as any physical or mental condition that limits or prevents a person from working for at least six months. The condition may result from accidents, disease, violence or congenital abnormalities.³⁹ Based on the 1990 Census, Mississippi had a higher percentage of working age adults with work disabilities (11%) than the United States as a whole (8.2%).⁴⁰ The rate for Mississippi was fourth highest in the nation.⁴¹ The percentage of working age adults pre-

at 19. Forty-three percent of Mississippians rely on relatives for childcare. The childcare problem is much more acute for those in poverty because, if extended family is not available to help, the families could not afford to pay for childcare. *Id.* Not surprisingly, 34% of Mississippi families headed by an African-American woman working full-time year-round were in poverty at the 1990 Census. Hill, *supra* note 27, at 23.

³⁸ *Mississippi Leads Region in Work Disabled*, SPECIAL REPORT SERIES (Soc. Sci. Research Ctr., Miss. State Univ. Starkville, Miss.), Aug. 1997 [hereinafter *Mississippi Leads Region*].

³⁹ Barbara J. Logue, *Mississippi's Burden of Disability*, MISSISSIPPI'S BUSINESS, (Ctr. for Policy Research & Planning, Miss. Insts. of Higher Learning, Jackson, Miss.), Nov. 2000.

⁴⁰ *Mississippi Leads Region*, *supra* note 38.

⁴¹ Logue, *supra* note 39. The high rate of accidents in Mississippi may contribute to Mississippi's high rate of disability. Mississippi had the highest rate of

vented entirely from working by their disabilities (the severely disabled) was also higher for Mississippi (7.1%) than for the United States (4.2%) and the highest rate in the region. Overall, 110,274 working age adults were prevented from working by disability. The more urban counties had lower rates of disability preventing work (e.g., DeSoto-4.4%, Hinds-5.4%) while most other rural counties had rates between 7 and 10%.⁴² As might be expected, the prevalence of work preventing disability rises with age from only 2.5% in the sixteen to thirty-four age group to over 20% in the fifty-five to sixty-four age group.⁴³

Fifteen percent of all poor people of working age were prevented from working by disabilities. Not surprisingly, of all those prevented from working by disabilities, 44% were in poverty. Almost 49,000 severely disabled Mississippians are in poverty and represent a sub-group of the poor population whose poverty is likely to be chronic. Mississippi does a good job of helping the moderately disabled find jobs, but the severely disabled are a more intractable category and only the prevention of disability among future generations can eliminate this source of poverty.⁴⁴

B. Lowered Educational Attainment

The less educated are hampered by low self-esteem, poor communications ability, reading deficiencies, poor self-presentation and limited work skills that impair the ability to get

death by accidents in the country in 1997. Mississippi also had the highest rate of deaths due to motor vehicle accidents, a rate twice the national average. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl.130, (120th ed. 2000). It may be assumed that the high rate of fatal accidents is accompanied also by a high rate of near fatal or serious injuries in these same or similar accidents, many causing disability.

⁴² *Mississippi Leads Region*, *supra* note 38. The next highest rate in a southern state was that of Arkansas at 6.6%.

⁴³ Logue, *supra* note 39. Mississippi had the highest death rate in the country in 1997 due to diseases of the heart and the third highest death rate for cerebrovascular disease (e.g., strokes). STATE RANKINGS, *supra* note 18, at 377, 381. The prevalence of these diseases may be a major contributor to work related disability in the older age group.

⁴⁴ Logue, *supra* note 39.

and keep a job in an economy moving away from manual labor.⁴⁵ Of the working age group between twenty-five and fifty-nine years of age in Mississippi, 40% of those with less than a ninth grade education were in poverty. Similarly, almost one third (31.2%) of working age Mississippians with some high school education but no diploma were in poverty.⁴⁶ Eighteen percent of those with less than a ninth grade education were receiving public assistance according to the 1990 Census.⁴⁷

Educational attainment is also correlated with disability. Eleven percent of those who did not complete high school had work-preventing disabilities as compared to only 2% for those with bachelor's degrees. Remarkably, 26% of those with less than a ninth grade education were severely disabled.⁴⁸

C. Poverty and Housing

Poor housing is symptomatic of poverty in Mississippi. Like other rural states, Mississippi has a significant percentage of people below poverty who own their own homes but live in very inadequate conditions. Poverty level renters also often live in conditions that are either overcrowded or lack adequate plumbing. Much of the poor housing, for example in the Delta,

⁴⁵ Barbara J. Logue, *Education Counts in Mississippi*, MISSISSIPPI'S BUSINESS (Ctr. for Policy Research & Planning, Miss. Insts. of Higher Learning, Jackson, Miss.), Feb. 1998.

⁴⁶ *Id.* Unfortunately, despite the strong association between poverty and dropping out of high school, Mississippi had the lowest public high school graduation rate in the country in 1999, 52.8%. The national rate was 67.5%. Perhaps more unfortunate, the rate of high school graduation actually declined in Mississippi between 1995 and 1999. Nationally, the rate improved 10% over the same period. STATE RANKINGS, *supra* note 18, at 129-30.

⁴⁷ Logue, *supra* note 45.

⁴⁸ Logue, *supra* note 39. Depending on when in life the disability occurs and the severity of the disability, the disabled have greater difficulty obtaining an education in the first place. But also, the less educated are more likely to become disabled. The less educated tend to work in more dangerous jobs and have a lower level of safety awareness on and off the job. The better educated are less likely to engage in risky behaviors, and are more likely to prevent medical problems before they commence and seek and follow medical advice when needed. In addition, the better educated are more likely to succeed in vocational rehabilitation programs if disabled. Logue, *supra* note 45.

was built for farm laborers long ago. Although the need for farm labor is much reduced, many poor, and often elderly, remain as tenants in this housing, sometimes paying no cash rent at all. Over 20% of rural renters in Mississippi paid no cash rent according to the 1990 Census.⁴⁹

Of all the occupied housing units in 1990, 5.8% were overcrowded with more than one person per room. This condition is linked to rural poverty. The high poverty Mississippi Delta counties had rates of overcrowding generally twice the average for the state.⁵⁰ In addition, across the state there were 17,625 housing units which lacked complete plumbing facilities.⁵¹ About 5% of all housing units with a black householder lacked adequate plumbing, compared to less than one half of 1% for white households.⁵²

D. Special Problems of Children

The Annie E. Casey Foundation tracks ten key indicators of child well-being. Between 1985 and 1996, child well-being improved for seven of the indicators. The three indicators for which child well-being deteriorated were the percentage of low birth weight babies, teen birth rate and the percentage of families with children headed by a single parent. For these latter three indicators, as well as infant mortality and the child death rate, the Mississippi figures are disturbingly high and are discussed below. These indicators are important because the problems they reflect interact to influence the well-being and development of children and determine whether they will be able to succeed in the new century.⁵³ Although

⁴⁹ Deborah H. Bell, *The Law Clinic as a Regional Center: Looking for Solutions to Rural Southern Housing Problems*, 103 WASH. U. J. URB. & CONTEM. L. 103, 105-07 (1992).

⁵⁰ COUNTY AND CITY DATA BOOK, *supra* note 8, at 304, 318. The range of rates of overcrowding went from a low of 9.1% in Quitman County and Yazoo County to a high of 15.1% in Tunica County. *Id.*

⁵¹ U.S. Census Bureau, *Race of Householder by Plumbing Facilities (Mississippi)*, in U.S. CENSUS DATABASE C90STF3C1, at <http://venus.census.gov/cdrom/lookup> (last visited Mar. 9, 2001) (on file with the Mississippi Law Journal).

⁵² *Id.*

⁵³ William P. O'Hare, *KIDS COUNT: Identifying and Helping America's Most Vulnerable*, STATISTICAL BULLETIN (Metro. Life Ins. Co., New York, N.Y.), Jan.-

these problems cut across all sectors of Mississippi society, the poverty group is almost certainly over-represented for each indicator and a major determinant of overall state performance.

The infant mortality rate (deaths per 1000 live births) counts deaths of children under the age of one. Children born into poor families are more likely to experience health problems and there is evidence to suggest that they have an infant mortality rate 50% higher than children born into families above the poverty line.⁵⁴ The infant mortality rate for Mississippi dropped from 13.7 in 1985 to 11 in 1996. However, this compared with a national rate that was only 7.3, placing Mississippi last among states in this category.⁵⁵

Low birth-weight among babies (less than 2500 grams or five and a half pounds) is associated with poverty and many other factors. It is important because low birth-weight babies are much more likely to experience developmental difficulties and require extraordinary services.⁵⁶ In Mississippi, low birth-weight babies represented 9.9% of all births in 1996, a figure ranking fiftieth among states.⁵⁷ On the other hand, the

Mar. 2000, at 26 [hereinafter O'Hare, *Most Vulnerable*].

⁵⁴ William P. O'Hare, *Making KIDS COUNT*, STATISTICAL BULLETIN (Metro. Life Ins. Co., New York, N.Y.), Jul.-Sept. 1998, at 2-3 [hereinafter O'Hare, *KIDS COUNT*]. This indicator is more a manifestation of poverty than a cause. High infant mortality rates are associated with poverty, illiteracy, unemployment and absence of neonatal intensive care. The improvement in the infant mortality rate that has been seen between 1985 and 1996 is due primarily to advances in medical technology. *Id.*

⁵⁵ THE MISS. FORUM ON CHILDREN & FAMILIES, KIDS COUNT NATIONAL DATA, MISSISSIPPI 1999, at http://www.mfcf.org/national_data99.html (last visited Mar. 13, 2001). Somewhat surprisingly, Mississippi did not have the highest infant mortality rate in the nation for either the white population or the black population. Mississippi has a very high white infant mortality rate, ranked fifth in the nation for 1997. The black infant mortality rate for Mississippi is only eighteenth among states, but still higher than the rate for whites in any state. Because the African-American population in Mississippi is large, the composite effect makes the overall rate the highest in the nation. STATE RANKINGS, *supra* note 18, at 364-66.

⁵⁶ O'Hare, *KIDS COUNT*, *supra* note 54, at 5.

⁵⁷ O'Hare, *Most Vulnerable*, *supra* note 53, at 27. The percentage actually increased from 8.8% in 1985. The national figure for 1996 was 7.4%. MISS. FORUM ON CHILDREN & FAMILIES, *supra* note 55.

child death rate measures deaths among children between the ages of one to fourteen. In Mississippi in 1996, the child death rate was 41 per 100,000 children compared to 26 nationally, last among all states.⁵⁸

The birth rate among teenagers and the prevalence of families with children headed by a single parent are linked. The teen birth rate (per 1000 females aged fifteen to seventeen) was 52 in Mississippi in 1996 compared to 34 nationally, the highest rate in the country. At the same time in Mississippi, among families with children, 35% were headed by a single parent. This compares to 27% nationally and is again the highest rate in the country.⁵⁹ These indicators are of concern because of the high risk that a single-parent family with young children will fall into poverty.⁶⁰ The majority of children who live in single-parent homes will experience poverty.⁶¹ Indeed, this condition tends to perpetuate poverty because of the lessened educational opportunity available to children in single-parent homes and the increased likelihood that such children will grow up and have children themselves when they are still in their teens.⁶²

⁵⁸ O'Hare, *Most Vulnerable*, *supra* note 53, at 27. The child death rate is almost certainly linked to the rate of death by accidents, which is high for Mississippi. See *supra* note 41 and accompanying text. There are other statistics of concern. The teen death rate (deaths per 100,000 teens age fifteen to nineteen) was second highest in the country. Fifty-two percent of fourth grade students scored below basic reading level in 1998 as compared to 39% for the United States. Eighteen percent of Mississippi children lacked health insurance coverage as compared to 14% nationally. However, the juvenile crime rate was much lower for Mississippi than for the United States. The violent crime rate per 100,000 youths aged ten to seventeen was 265 for Mississippi and 471 for the United States in 1996, while the property crime rate was 1848 and 2444, respectively. MISS. FORUM ON CHILDREN & FAMILIES, *supra* note 55.

⁵⁹ O'Hare, *Most Vulnerable*, *supra* note 53, at 27.

⁶⁰ See *supra* note 37 and accompanying text.

⁶¹ Barbara J. Logue, *Living Arrangements of Children In Mississippi: Deterioration Since 1980*, MISS. ECON. REV. & OUTLOOK (Ctr. for Policy Research & Planning, Miss. Insts. for Higher Learning, Jackson, Miss.), Jan. 1998, at 32.

⁶² *Id.* The percentage of children in single parent families increased from 19% in 1980 to 25.9% in 1990, a 36% increase. *Id.* at 27.

IV. CONCLUSION

Even more than other states, the success that Mississippi has in dealing with poverty has significant implications for the future fiscal health of the state, the well-being of its families and the character of its work force.⁶³ Poverty in Mississippi has been and remains both chronic and deep, but significant progress has been made. Fifty-five percent of all Mississippians were in impoverished in 1959.⁶⁴ The most recent rate is down to 16.8%. In just ten years, between 1989 and 1998, the poverty rate dropped over 8% as over 200,000 Mississippians left poverty.⁶⁵ It remains to be seen if the gains can be sustained and improved upon at the dawn of the twenty-first century.

John Christian Elstad

⁶³ O'Hare, *supra* note 25, at 42.

⁶⁴ BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1972, at 331.

⁶⁵ See *supra* note 18 and accompanying text.

Mississippi's Child Support Guidelines: Need, Process and Review

I. INTRODUCTION

Why should Mississippi modify section 43-19-101 of the Mississippi Code? Consider that from 1992 to 1996, the number of children under the age of six living in poverty in Mississippi averaged 35.5%.¹ To place this percentage in perspective, surveys indicate that nationally, 20% of all children live in poverty.² A United States Census Bureau Model-Based Income and Poverty Estimate (1995) released in February of 1999 suggested that Mississippi had 240,084 children under age eighteen in poverty, 155,334 related children ages five to seventeen living in families in poverty and 76,346 children under the age of five in poverty.³ Broken down in terms of family type, for those with related children under the age of eighteen, 1990 United States Census Data indicated that Mississippi had 149,771 children falling below the poverty level, while residing with a female householder.⁴ Interestingly, 12,052 children within the same age group fell below the poverty level, while living with a male householder.⁵

¹ NATIONAL CENTER FOR CHILDREN IN POVERTY, COLUMBIA SCHOOL OF PUBLIC HEALTH, MAP AND TRACK: STATE INITIATIVES FOR YOUNG CHILDREN AND FAMILIES app. B (1998).

² Gregory Acs & Megan Gallagher, *Income Inequality Among America's Children*, in NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES, 1 (The Urban Inst., Series No. B-6, 2000).

³ Search of the Small Area Income and Poverty Estimates Program, U.S. Dep't of Commerce, Bureau of the Census, (October 9, 2000). Additionally, the estimate placed Mississippi's median household income at \$26,501. *Id.*

⁴ Search of Database C90STF3A, U.S. Dep't of Commerce, Bureau of the Census, 1990 U.S. Census Data (October 9, 2000). For this statistical universe, "female householder" indicates the absence of a husband. Due to the unavailability of the 2000 Census information, analysis of 1990 Census data is employed for purposes of this comment.

⁵ *Id.* The greater number of children living below the poverty level with female householders, in comparison to male householders, is consistent with other studies. In 1995, the national poverty rate for custodial mothers was 33%, while the poverty rate for custodial fathers was 14%. LYDIA SCOON-ROGERS, U.S. CENSUS BUREAU, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1995, at 1 (Mar., 1999). Moreover, after divorce, the fiscal condition of men improved 17%,

Meanwhile, Mississippi had 84,401 related children under the age of eighteen and under the poverty level living in married couple or two-parent families.⁶ The State had four times as many children within this category residing in married couple families living above the poverty level, as compared to children living in single-parent households.⁷ Thus, Mississippi, like the rest of the nation, embodies two levels of disparity for children in poverty. Statistics support that children living with a male householder are financially better off than those living with a female householder. Likewise, children residing in married, or two-parent family, settings are financially better off than those residing with a single-parent. A national study of income inequality among children noted this disparity in terms of Income-to-Needs Ratio.⁸ The Income-to-Needs Ratio expresses a family's income as a proportion of the federal poverty line for a family of a certain size.⁹ Nationwide, legal two-parent families had a ratio of 2.84; however, legal single-parent families had a 1.15 ratio.¹⁰ Mississippi had an Income-to-Needs ratio of 1.67 for all children, 2.48 for two-parent families and 0.81 for one-parent families.¹¹ Therefore,

while women's economic capacity decreased by 29%. JOSEPH I. LIEBERMAN, CHILD SUPPORT IN AMERICA: PRACTICAL ADVICE FOR NEGOTIATING AND COLLECTING A FAIR SETTLEMENT 14 (1986) (referring to study conducted by Saul Hoffman and John Holmes). Again, the term "male householder" indicates the absence of a spouse.

⁶ Search of Database C90STF3A, U.S. Dep't of Commerce, Bureau of the Census, 1990 U.S. Census Data (October 9, 2000).

⁷ *Id.* National statistics parallel Mississippi's disparities as, in 1998, 46% of all children living in female households were poor. Yet, fewer than 9% of children living in married families were poor. MICHELLE HARPER & SHARON VANDIVERE, POVERTY, WELFARE AND CHILDREN: A SUMMARY OF THE DATA, <http://www.childtrends.org/PDF/povwelf.pdf> (last modified Aug. 18, 2000). The reader should reference Richard Wertheimer, *Trends in the Well-Being of America's Children and Youth: 1999*, for detailed source reference for this data.

⁸ Acs & Gallagher, *supra* note 2.

⁹ *Id.* Income at the federal poverty level amounts has a ratio of 1.0. *Id.*

¹⁰ *Id.* The tabulations were derived from the 1997 National Survey of America's Families.

¹¹ *Id.* Mississippi ranked below the national average, falling behind New Jersey, Massachusetts, Minnesota, Wisconsin, Michigan, Washington, Colorado, New York, Florida, Alabama, California and Texas. Importantly, the study noted that Mississippi stood out as having a high child income inequality. Further, even though Mississippi has a low median family income, the ability to diminish this

given the significant number of children living in poverty in single parent situations, the State should focus its efforts on attainable options for addressing the problem. Modifying section 43-19-101 presents a way for Mississippi to make a difference while utilizing a means that is already in place. This is not to suggest that increasing the percentages is the only way in which to remedy child poverty in these situations. Poverty negatively affects child development, and income by way of child support can diminish child poverty. Yet, the inherent weaknesses of the statute require not only an adaptation of the presumptive percentages, but also an establishment of processes and goals.

II. EFFECTS OF POVERTY ON CHILDREN

The economic atmosphere of families directly influences child development. In particular, poverty negatively impacts the growth of children biologically and socially. Brain development occurs through changes in cell size and maturity, as well as the complexity of cell connections.¹² Factors influencing these elements include physical, socioemotional, cognitive and nutritional conditions.¹³ Thus, indicative of controllable variables, environmental factors such as resource constraints impact brain development.¹⁴ Relative lack of income results in, among other things, inadequate nutrition, fewer learning experiences and instability of residence.¹⁵ Chart one repre-

disparity exists. *Id.* The study cited increasing welfare benefits or earned income tax credits as possible methods of accomplishing this goal.

¹² LYNN A. KAROLY ET AL., *INVESTING IN OUR CHILDREN: WHAT WE KNOW AND DON'T KNOW ABOUT THE COSTS AND BENEFITS OF EARLY CHILDHOOD INTERVENTIONS* 3 (1988).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, *THE FUTURE OF CHILDREN: CHILDREN AND POVERTY*, Summer/Fall 1997, at 55, 56, available at http://www.futureofchildren.org/pubs-info2825/pubs-info.htm?doc_id=72141. Within the study, the authors recognized that certain portions of society believe that income does not directly affect child development. *Id.* at 67. Brooks-Gunn and Duncan rebut this position by highlighting inherent testing weaknesses in the opposition's position, while emphasizing studies demonstrating: (1) differences in sibling incomes as associated with sibling differences in

sents a selection of indicators of well-being for poor and non-poor children in the United States.¹⁶

Addressing the position that poverty does not directly cause negative outcomes in children, one approach considers child well-being in terms of sociodemographic risk.¹⁷ Sociodemographic risk derives from four factors: (1) single parenthood; (2) four or more children living in the child's household; (3) the lack of a high school diploma or GED by the child's parent; and (4) poverty.¹⁸ Notably, Mississippi was recognized as scoring above the national average of children experiencing high-risk.¹⁹ The study indicated that high-risk children were significantly more likely to skip school, to have been suspended or expelled from school and to be less engaged in school.²⁰ The sociodemographic risk perspective suggests that poverty is but one of several factors influencing child development. However, regardless of the point-of-view, poverty has an impact upon child development.

completed schooling and (2) a positive correlation between increased income and "child nutrition, early school achievement and high school completion" within specific testing sites. *Id.* In conclusion, the study acknowledged the complexity of associating income with child development; however it correlated a strong relationship between family income and children's ability and achievement-related outcomes. *Id.*

¹⁶ *Id.* at 58-59. How poor is defined is not addressed specifically in the article. However, the article reflects that income influences each factor differently, as well as noting that prolonged periods of poverty and early childhood poverty greatly impacts the outcome of children. *Id.* at 57, 68.

¹⁷ Kristin Anderson Moore et al., *Sociodemographic Risk and Child Well-Being*, in *NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES* (The Urban Inst., Series No. B-18, June 2000), http://newfederalism.urban.org/pdf/anf_b18.pdf (last visited Apr. 1, 2000).

¹⁸ *Id.* With respect to children under the age of eighteen with family income below 100% of the federal poverty level, 49.8% experienced one additional risk factor, 23.8% experienced two additional factors and 4.8% experienced three additional factors. *Id.*

¹⁹ *Id.*

²⁰ *Id.* The National Survey of American Families (NSAF) defines school engagement in terms of whether the child cares about doing well in school, only works on school work when forced to, does just enough school work to get by or always does homework. MEGAN GALLAGHER & SHEILA ZEDLEWSKI, *INCOME AND HARDSHIP: POVERTY AMONG CHILDREN*, http://newfederalism.urban.org/income_support.html#well (last visited Jan. 20, 2000).

CHART 1

Indicator	Percentage of Poor Children	Percentage of Non-Poor Children
Learning Disability ²¹	8.3%	6.1%
Grade Repetition ²²	28.8%	14.1%
Ever Expelled/Suspended	11.9%	6.1%
High School Dropout ²³	21.0%	9.6%
Economically Inactive at Age Twenty-four ²⁴	15.9%	8.3%
Experienced Hunger ²⁵	15.9%	1.6%
Female Teens (Out of wedlock birth)	11.0%	3.6%

III. CHILD SUPPORT AND INCOME

With the knowledge that Mississippi has a significant number of children in poverty living in single-parent homes, it makes sense to alleviate that poverty and the corresponding detriment by increasing the available income for a custodial parent to raise a child or children. Statistics have shown that for children residing in single-parent families, public transfers and social insurance constitute a greater percentage of those families' income source, as compared to two-parent families.²⁶

²¹ GALLAGHER & ZEDLEWSKI, *supra* note 20, at 58. "Learning disability" is defined as having exceptional difficulty in learning to read, write or do arithmetic. *Id.*

²² *Id.* Grade repetition is given in terms of whether the person has ever repeated a grade. *Id.*

²³ *Id.* The high school dropout rate is in terms of percentage of sixteen to twenty-four year olds who were not in school or did not finish school in 1994. *Id.*

²⁴ *Id.* Economically inactive means not employed or in school. *Id.*

²⁵ *Id.* These percentages indicate the number of persons experiencing food insufficiency at least once in the past year. *Id.*

²⁶ Acs & Gallagher, *supra* note 2. In 1996, public transfers and social insur-

Accordingly, parental earnings constitute a greater share of two-parent family income, as compared to single-parent families.²⁷ This indicates an area for states, particularly Mississippi, to target for improving the conditions and capacities of children. Mississippi's children living in single-parent households are particularly vulnerable, as statistically their Income-to-Needs ratio demonstrates that their total family income falls short of the poverty level. Consequently, public assistance is essential to these children.²⁸ In 1996, 23% of children in single-parent families received Aid to Families with Dependent Children (AFDC) and 35% received food stamps, yet for children living two-parent families, 3% received AFDC and 9% received food stamps.²⁹

Although increasing public support and increasing income by way of tax incentives are potential options for diminishing poverty and inequality in Mississippi, this comment focuses upon modifying the child support guidelines as a viable,³⁰ privately attainable option. Mississippi has taken significant steps toward enhancing the enforcement of child support orders;³¹ however, its child support award percentages, set forth in section 43-19-101 of the Mississippi Code, are consistently lower than other southern states³² and ranked forty-

ance constituted 23.6% of single-parent family income but only 3.9% of two-parent income.

²⁷ *Id.* Parental earnings constituted 90.8% of married family income but only 51.1% of single-parent family income.

²⁸ Based upon 1990 Census Data, Mississippi had 118,033 total households receiving public assistance. Search of Database C90STF3C1, U.S. Dep't of Commerce, Bureau of the Census, 1990 U.S. Census Data (October 9, 2000).

²⁹ ELAINE SORENSEN & CHAVA ZIBMAN, THE URBAN INSTITUTE, TO WHAT EXTENT DO CHILDREN BENEFIT FROM CHILD SUPPORT? 2 (Assessing the New Federalism, Discussion Paper No. 99-11, 2000), available at <http://newfederalism.urban.org/html/discussion99-19.html>.

³⁰ Recognizing that their study was probably underestimating the level of inequality that would exist in families whose average monthly income without child support would fall below their state's AFDC standard for a family of that size, Sorensen and Zibman estimated that child support reduces child poverty by approximately 5%. *Id.* The study also determined that child support payments reduce the national poverty gap by 8%. *Id.*

³¹ For example, MISS. CODE ANN. § 93-11-163 (Supp. 2001) allows for the revocation of state issued licenses for failure to comply with a child support order.

³² For each state comparison, the percentages correspond to one through five

eighth in a national comparison of support guidelines,³³ but have nevertheless remained unchanged. In 1989, section 43-19-101 allowed for 17%, 25%, 29%, 31% and 34% for one through five or more children, but these percentages were reduced to the current proportions.³⁴ Presently, Mississippi mandates the following rebuttable percentages of income for child support: 14%, 20%, 22%, 24% and 26%.³⁵

IV. SECTION 43-19-101 MANDATES, HISTORY AND PROCESS FOR REVIEW

The Mississippi Legislature passed section 43-19-101 in response to the Family Support Act of 1988.³⁶ One goal of the

or more children. For example, Georgia's statute allocates percentage ranges: 17-23%, 23-28%, 25-32% and 31-37%. GA. CODE ANN. § 19-6-15 (1999). Based upon net resources of obligor income, Texas provides 20%, 25%, 30%, 35% and 40%. TEX. FAM. CODE ANN. § 154.125 (Vernon 1996). Texas guidelines are designed to apply to situations in which the obligor's monthly net resources are \$6000 or less. *Id.* § 154.125.

³³ Maureen A. Pirog et al., *Interstate Comparison of Child Support Orders Using State Guidelines*, 47 FAM. REL. 289 (1998). The ranking was obtained by combining each state's total percentage deviation from the national median. Mississippi ranked lower than the median in every income category.

³⁴ These percentages correspond to the guidelines set forth on October 1, 1989.

³⁵ Section 43-19-101 has no documented record setting forth the exact basis for the statutory percentages. Compare this statute to a similar one in Alabama:

The Schedule of Basic Child Support Obligations was developed through research sponsored by the National Center for State Courts and is based on extensive economic research on the cost of supporting children at various income levels. This schedule is based on gross income and has been adjusted for Alabama's income distribution relative to the U.S. income distribution.

ALA. R. JUD. ADMIN. 32 cmt. (Michie 1996).

³⁶ 42 U.S.C. § 667 (1994). Section 667 states, in part:

(a) Establishment of guidelines; method

Each State, as a condition for having its State plan approved under this part, must establish guidelines for child support award amounts within the State. The guidelines may be established by law or by judicial or administrative action, and shall be reviewed at least once every 4 years to ensure that their application results in the determination of appropriate child support award amounts.

(b) Availability of guidelines; rebuttable presumption

(1) The guidelines established pursuant to subsection (a) of this section shall be made available to all judges and other officials who have

Family Support Act was to provide for consistency³⁷ in child support awards.³⁸ Accordingly, Mississippi law mandates that

[t]he Department of Human Services shall review the *appropriateness* of these guidelines . . . every four (4) years . . . and report its findings to the Legislature no later than the first day of the regular legislative session of that year. The Legislature shall thereafter amend these guidelines *when it finds that amendment is necessary to ensure that equitable support* is being awarded in all cases involving the support of minor children.³⁹

Although section 43-19-101 and 42 U.S.C. § 667 mandate review every four years, the Mississippi Department of Human Services (DHS or the Department) has taken a yearly review and recommendation approach.⁴⁰ Recommendations are made

the power to determine child support awards within such State.

(2) There shall be a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the award which would result from the application of such guidelines is the correct amount of child support to be awarded. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria established by the State, shall be sufficient to rebut the presumption in that case.

42 U.S.C. § 667(a), (b). Congress explained:

It is the purpose of this Act to replace the original aid to families with dependent children program with new provisions for child support that (1) stress family responsibility and community obligation in the context of the vastly changed family arrangements of the intervening half century; (2) enforce the principle that child support must in the first instance come from parents, and only thereafter from the community, which however has the deepest obligation to enable parents to fulfill their responsibilities through expanded opportunities in education and training; and (3) reflect the need for benefit improvement, program innovation, and organizational renewal at every level in the Federal system.

S. REP. NO. 100-377, at 14-15 (1988) (citing S. 1511, 100th Cong. pmb. (1988) (codified as amended in scattered sections of 42 U.S.C.), *reprinted in* 1988 U.S.C.C.A.N. 2776, 2791-92.

³⁷ For instance, a study of several Florida judges demonstrated wide variations with respect to the awards they made in comparable factual circumstances. LIEBERMAN, *supra* note 5, at 12 (citing study conducted by Kenneth White and R. Thomas Stone, Jr.).

³⁸ 42 U.S.C. § 667; 45 C.F.R. 302.56 (1999).

³⁹ MISS. CODE ANN. § 43-19-101(5) (2000) (emphasis added).

⁴⁰ Telephone Interview with Darrell Baughn, Child Support Division, Missis-

with respect to federally mandated changes, as well as non-mandated changes. Increasing the child support percentages falls within the category of non-mandated changes. As for the process of review, the child support division engages attorneys from around the state to determine what recommendations should be made to the Legislature.⁴¹ These recommendations are primarily based upon expertise, experience in the area of family law and common sense.⁴² To a lesser degree, specific studies and statistical data factor into the decision-making process.⁴³ After the review and determination of recommendations with respect to the guidelines, the proposals are drafted into legislation. Accordingly, the legislation gets introduced into both the House and Senate. Preferably, the chairpersons for the House Judiciary A Committee, Senate Judiciary and Senate Public Health and Welfare sponsor the bills. Notably, the legislation gets double-referred in Senate.⁴⁴ The proposed bills are then subject to the legislative process.

Recently, the Legislature considered, but failed to pass, several bills that would have increased the child support percentages to what DHS felt were *appropriate* levels.⁴⁵ Specifically, in 1999, Rep. Bobby Moody introduced a bill that set the levels at 19%, 25%, 27%, 29% and 31%, but it also failed in committee.⁴⁶ Also, in 2000, Sen. Robert G. Huggins sponsored a bill that would have raised the percentages to 17%, 23%, 25%, 27% and 29%.⁴⁷ In 2002, DHS did not have its guideline recommendations introduced in the form of a bill. However, it

Mississippi Department of Human Services (Oct. 16, 2000).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* Mr. Baughn emphasized the inadequacy of statistical data required to conduct yearly reviews, as well as the manpower problems associated with conducting such research. *Id.*

⁴⁴ *Id.* Mr. Baughn pointed out the inherent difficulties associated with the double referral, as committee amendments require agreement before legislation leaves the committee level. *Id.*

⁴⁵ Because of database limitations, the review of legislation was limited to 1997.

⁴⁶ H.R. 854, 1999 Regular Session (Miss. 1999) (died in Senate Committees on Public Health and Welfare and the Judiciary, Mar. 2, 1999).

⁴⁷ S. 2841, 2000 Regular Session (Miss. 2000) (died in Senate Committees on Public Health and Welfare and the Judiciary, Mar. 7, 2000).

did provide a report to the Legislature.⁴⁸ Other legislation has been introduced over the years, although not based upon any recommendations of DHS, which supported percentage increases. For example, in 1999, Sen. Jim Bean introduced legislation⁴⁹ to increase the percentages to 19% for one child, 25% for two children, 27% for three children, 29% for four children and 31% for five or more children.⁵⁰ Additionally, Sen. Dean Kirby sponsored bills in 2001 and 2002 which incorporated percentage increases of 17%, 23%, 25%, 27% and 29%, as well as the recommendation suggested later in this comment regarding the establishment of a review commission.⁵¹ Rep. John R. Reeves sponsored a bill in 2002 to subject gaming proceeds to child support judgments, but also to increase the percentages to 19%, 25%, 27%, 29% and 31%.⁵² The common thread in this legislative history is that the Legislature, by and through the aforementioned committees, has failed to find it necessary to amend the guidelines in order to ensure that equitable support is being awarded. Fault may rest in part with the process, which raises several questions. Why doesn't DHS issue formal written recommendations? Why aren't the recommendations provided to all legislators? Why is the appropriateness of the guidelines limited to and determined by certain committees?⁵³ After all, the statute reads, "[t]he Legislature shall thereafter amend . . . when it finds that amendment is necessary." Over a decade

⁴⁸ Telephone Interview with Darrell Baughn, Child Support Division, Mississippi Department of Human Services (Feb. 11, 2002). This was an informal report that simply reemphasized the need for percentage increases. *Id.* It was not, however, based on any noted statistical data. *Id.*

⁴⁹ Senator Bean attempted to pass an increase in 1998 as well, but Senate Bill 2558 died in the House Judiciary A Committee. That bill suggested increasing the percentages to 17%, 23%, 25%, 29% and 32%.

⁵⁰ S. 2314, 1999 Regular Session (Miss. 1999) (died in Senate Committees on Public Health and Welfare and the Judiciary, Apr. 2, 1999).

⁵¹ S. 2015, 2002 Regular Session (Miss. 2002) (died in Senate Public Health and Welfare Committee, Feb. 5, 2002); S. 2275, 2001 Regular Session (Miss. 2001) (died in Senate Public Health and Welfare Committee, Jan. 30, 2001).

⁵² H.R. 116, 2002 Regular Session (Miss. 2002) (died in House Judiciary A Committee, Feb. 5, 2002).

⁵³ Kentucky requires that the commission make a recommendation to the Kentucky General Assembly. KY. REV. STAT. ANN. § 403.213(5) (Michie 1999 & Supp. 2001).

has passed without either an increase or decrease.

It is apparent that any increase in the percentages is subject to political barriers. These barriers arise from the statutory language.⁵⁴ It does not matter whether the Department reports findings that support adaptation of the percentages to meet current costs. The determining factor is whether the Legislature recognizes a need and decides to remedy the need by modifying the percentages. Accepting that these obstacles represent significant, yet not insurmountable hurdles, this comment focuses upon areas in need of improvement that could potentially result in the modification of the child support guidelines as envisioned by federal and state law.

A. *Enhancing the Guideline Review*

Given the ad hoc nature of the review process, Mississippi should seek to codify a standing, consistent, cohesive committee, body or commission for reviewing the child support guidelines. Taking such action will facilitate a base level of common knowledge for approaching and evaluating the percentage levels with respect to newly available statistical data and surveys. Such a commission would set and evaluate goals and objectives. In short, a review commission would foster a comprehensive expertise on Mississippi's children with a primary focus on child inequality and poverty. Currently, the Legislature gives no official guidance to DHS concerning who specifically should determine what child support percentage is *appropriate*. The statute merely mandates that the Department shall review the guidelines.⁵⁵

Looking to other jurisdictions for guidance, Kentucky provides a good example of a statutorily established review committee. That statute provides in part:

[t]he child support guidelines table shall be reviewed . . . by a commission consisting of the following persons: (a) The secretary of the Cabinet for Families and Children . . . (b) Two (2) members of the Kentucky Bar Association who have at least

⁵⁴ MISS. CODE ANN. § 43-19-101(5) (2000).

⁵⁵ See *supra* note 39 and accompanying text.

six (6) consecutive years' experience and are presently practicing domestic relations cases, one (1) member from a metropolitan or large urban area and one (1) member from a less populated area; (c) Two (2) Circuit Judges appointed by the Chief Justice of the Kentucky Supreme Court . . . (d) One (1) District Judge appointed by the Chief Justice of the Kentucky Supreme Court; (e) Two (2) county attorneys appointed by the president of the County Attorneys Association . . . (f) The Attorney General . . . (g) One (1) person who is a custodial parent; (h) One (1) person who is a noncustodial parent; (i) One (1) person who is a parent with split custody; and (j) One (1) child advocate. The members designated in paragraphs (g) to (j) of this subsection shall be appointed by the Governor from a list of three (3) names for each category submitted by the Cabinet for Families and Children. If the status of one (1) of these members changes, the member shall be replaced through appointment by the Governor from a list of three (3) names submitted by the cabinet.⁵⁶

The District of Columbia requires a review by an

(a) . . . established . . . Child Support Guideline Commission ("Commission"). . . .

(b) The Commission shall consist of a chairperson and 14 members who are District of Columbia residents. The Chief Judge of the Superior Court of the District of Columbia may appoint 5 members. The Mayor of the District of Columbia ("Mayor") shall appoint 1 member to represent the Corporation Counsel and 1 member to represent the Child Support Division of the Department of Human Services. The Mayor, with the advice and consent of the Council, shall appoint 3 members who shall be members of the District of Columbia Bar ("Bar") and recognized experts in the field of family law. The Chairman of the Committee on the Judiciary of the Council shall be the chairperson of the Commission and appoint 2 other members. The Chairman of the Committee on Human Services of the Council shall appoint 2 members.⁵⁷

Additionally, the California Code states that

⁵⁶ KY. REV. STAT. ANN. § 403.213(4).

⁵⁷ D.C. CODE ANN. § 16-916.2 (1997).

(f) [i]n developing its recommendations, the Judicial Council shall consult with a broad cross-section of groups involved in child support issues, including, but not limited to, the following:

- (1) Custodial and noncustodial parents.
- (2) Representatives of established women's rights and fathers' rights groups.
- (3) Representatives of established organizations that advocate for the economic well-being of children.
- (4) Members of the judiciary, district attorney's offices, the Attorney General's office, and the State Department of Social Services.
- (5) Certified family law specialists.
- (6) Academicians specializing in family law.
- (7) Persons representing low-income parents.
- (8) Persons representing recipients of assistance under the Aid to Families with Dependent Children (AFDC) program seeking child support services.
- (g) In developing its recommendations, the Judicial Council shall seek public comment and shall be guided by the legislative intent that children share in the standard of living of both of their parents.⁵⁸

Colorado takes a similar approach by requiring a review committee consisting of

... no more than twenty-one members. The governor shall appoint persons to the commission who are representatives of the judiciary and the Colorado bar association. Members of the commission appointed by the governor shall also include the director of the division in the state department of human services which is responsible a male custodial parent, a female custodial parent, a male noncustodial parent, a female noncustodial parent, a joint custodial parent, a parent in an intact family, a judge or court magistrate, the director of the division in the state department of human services which is responsible for child support enforcement or his or her designee, an attorney who is knowledgeable in child support, and a director of a county department of social services. In

⁵⁸ CAL. FAM. CODE § 4054(f), (g) (West 1994).

making his or her appointments to the commission, the governor shall attempt to assure geographical diversity by appointing at least one member from each of the congressional districts in the state. The remaining two members of the commission shall be a member of the house of representatives appointed by the speaker of the house of representatives and a member of the senate appointed by the president of the senate and shall not be members of the same political party. The parent representatives, attorney representative, public members, and the legislative members shall not be employees of public agencies or courts which deal with child support issues.⁵⁹

Diversity and family experience underlie each of the approaches cited. Kentucky emphasizes diversity within the family support and legal community, while also seeking geographic diversity. The District of Columbia focuses upon varying political positions and influences. California takes the additional step of involving national organizations, as well as taking into account public comment. Colorado has decided to encompass various segments of society along gender, familial position, legal and professional lines. Importantly, Colorado's review committee includes members of the Legislature. Integrating members of the Legislature could conceivably bolster political support for amendment and increase overall legislative awareness, because the members are involved at every level of the process. Likewise, the statute seeks to minimize bias by denying members who deal directly with child support issues. Mississippi could benefit from codifying a review committee because its procedure currently lacks standardization. Establishing a standing committee, representing a cross-section of professions and influences, will not only promote standardization and accountability, but also provide a single, persuasive voice for recommending changes to the Mississippi Legislature.⁶⁰ Arguably, it

⁵⁹ COLO. REV. STAT. § 14-10-115 (2001).

⁶⁰ Taking into account the number of bills suggesting an increase in the child support percentages that have been killed in committee, it appears that some members of the Mississippi Legislature feel that the current levels are appropriate, despite DHS recommendations. This situation lends itself to several possible conclusions: (1) legislators reject DHS recommendations based upon their own

is less likely that legislators would disregard the time and resources expended by a recognized committee, over a four year period, as compared to the manner in which the Legislature currently disposes of DHS suggestions.

Another issue associated with determining the *appropriateness* of the percentages entails establishing what kind of information, data, persons or studies the review should rely upon. Again, the Mississippi Legislature has created a detrimental void by not outlining some criteria. Mississippi clearly needs to establish some guidance in this area in order to add more credibility to the process outlined earlier. Using recognized and universally accepted studies to support proposals will help to alleviate legislative misunderstanding and anxiety, in addition to providing an increased measure of public confidence. Some states have taken affirmative steps to establish review criteria. For example the Texas Legislature requires that the report contain:

(1) *economic data obtained from the United States Department of Agriculture on the cost of raising children;*

(2) *an analysis of case data on the application of and deviations from the child support guidelines; and*

(3) *a summary of any federal legislation enacted since the date of the last review.*⁶¹

Texas's decision to refer to national source data, in conjunction with a tailored, statewide case analysis offers a few benefits: (1) the USDA study represents a national survey which employs reliable methodology; (2) using one source of data for determining child rearing costs provides a baseline for conducting analysis of percentage effectiveness; (3) using a study

investigation or study; (2) legislators reject DHS recommendations based upon other personal or political considerations; or (3) legislators reject DHS recommendations due to a lack of confidence. These conclusions are offered in the absence of any legislative history or record concerning committee actions. In either case, exhaustive determinations of appropriateness, made by an accountable standing committee, should carry enough weight to deter rejection based upon non-economic factors.

⁶¹ TEX. FAM. CODE ANN. § 111.001(b) (Vernon Supp. 2002) (emphasis added). Texas differs from a majority of states, as it requires a review of the guidelines every year, instead of every four years.

of national scope, broken down into regional analysis, allows for potential interstate analysis; and finally (4) conducting statewide case analysis facilitates cause and effect examination of percentage application and whether the guidelines meet stated goals and expectations. Addressing the content of review, Virginia mandates that

[t]he panel shall determine the adequacy of the guideline for the determination of appropriate awards for the support of children by *considering current research and data on the cost of and expenditures necessary for rearing children, and any other resources it deems relevant to such review.*⁶²

More explicitly, the California Code directs that:

(a) [t]he Judicial Council shall periodically review the statewide uniform guideline to recommend to the Legislature appropriate revisions.

(b) The review shall include *economic data on the cost of raising children and analysis of case data, gathered through sampling or other methods, on the actual application of the guideline after the guideline's operative date.* The review shall also include *analysis of guidelines and studies from other states, and other research and studies available to or undertaken by the Judicial Council.*

(c) Any recommendations for revisions to the guideline shall be made to ensure that the guideline results in appropriate child support orders, to limit deviations from the guideline, or otherwise to help ensure that the guideline is in compliance with federal law.⁶³

California, like Texas, supports statewide sampling research of deviations from the guidelines and their overall effectiveness. It also recognizes the importance of looking to other states for alternative methodologies that the state could adopt in an effort to improve its own guidelines. Further, Arizona's child support statute provides, as background information, that

⁶² VA. CODE ANN. § 20-108.2(H) (Michie 2000 & Supp. 2001) (emphasis added).

⁶³ CAL. FAM. CODE § 4054(a)-(c) (emphasis added).

the

[i]nformation regarding development of the guidelines, including economic data and assumptions upon which the Schedule of Basic Child Support Obligations is based, is contained in the . . . report of Policy Studies, Inc., titled REVIEW OF THE ARIZONA CHILD SUPPORT SCHEDULE.⁶⁴

Arizona funds and relies upon private research, which uses both national and statewide data, to adapt its guidelines. Arizona also collectively benefits, because the supreme court publishes the statistical studies it considers as a part of its four-year review.⁶⁵

In some ways, Mississippi's review of the child support guidelines encompasses aspects of the aforementioned approaches, such as discussing costs and the percentages with individuals from across the state. Yet, the Legislature should require and expect that statistical data support any determination concerning the appropriateness of the percentages. Otherwise, the recommendations lack necessary credibility. Thus, it is important for the state to declare its expectations in order to ensure a valid approach.

B. Alternative Approach

Recognizing that political interests within the Legislature have acted as a barrier to any modification of the percentages, Mississippi's children and child support guidelines could also benefit from shifting the modification authority to the Mississippi Supreme Court. The Family Support Act provides that guidelines may be established by law or by judicial or administrative action.⁶⁶ Several state legislatures have granted this power to the judiciary and this approach appears reasonable,

⁶⁴ ARIZ. REV. STAT. ANN. § 25-320 app. (West 2000 & Supp. 2001).

⁶⁵ Arizona provides the guideline report for the public to review at <http://www.supreme.state.az.us/dr/Pdf/psi1.pdf>, as well as a statewide case file study at <http://www.supreme.state.az.us/dr/Pdf/psi2.pdf>. Arizona also solicits feedback in regard to the adequacy and fairness of the child support guidelines from the public. Those persons interested can view the website at <http://www.supreme.state.az.us/dr/childsup/survey.htm>.

⁶⁶ See *supra* note 36.

given that the courts apply and interpret the statute. For instance, Arkansas Family Law Code states:

(2) In determining a reasonable amount of support, initially or upon review to be paid by the noncustodial parent, the court shall refer to the most recent revision of the family support chart. It shall be a rebuttable presumption for the award of child support that the amount contained in the family support chart is the correct amount of child support to be awarded. Only upon a written finding or specific finding on the record that the application of the support chart would be unjust or inappropriate, as determined under established criteria set forth in the family support chart, shall the presumption be rebutted.

(3) The family support chart *shall be revised at least once every four (4) years by a committee to be appointed by the Chief Justice of the Arkansas Supreme Court to ensure that the support amounts are appropriate for child support awards.* The committee shall also establish the criteria for deviation from use of the chart amount.

(4) *The Arkansas Supreme Court shall approve the family support chart and criteria upon revision by the committee for use in this state and shall publish same through per curiam order of the court.*⁶⁷

Acting in accordance with the statute, the Arkansas Supreme Court has reviewed and modified its family support chart over the years. A historical overview of its process is outlined in its most recent per curiam order:

The Committee on Child Support initially made recommendations to the Court which formed the substance of the 1990 Per Curiam Order. On May 13, 1991, pursuant to the Committee's recommendations, *the Court issued a new Per Curiam Order which supplemented the original.* Then, in compliance with the four-year requirement of P.L. 100-485, *the Committee again submitted recommendations to the Court in October, 1993, and the Court issued the most recent Per Curiam Order on October 23, 1993, adopting the guidelines which are published in the Court Rules Volume of the Arkan-*

⁶⁷ ARK. CODE ANN. § 9-12-312(a)(2)-(4) (Michie 1998 & Supp. 2001).

sas Code Annotated.

In the ensuing four years, the Committee continued to study the existing guidelines pursuant to federal and state law and has once again submitted its recommendations.

Having carefully considered these most recent recommendations, the Court adopts and publishes Administrative Order Number 10—Arkansas Child Support Guidelines, effective October 1, 1997.⁶⁸

Information and anonymity are two apparent benefits inherent to the Arkansas model. Anonymity derives from the *per curiam* order, where the individual judge is associated with approving the recommended change. So even though the justices are elected and subject to political demands, the *per curiam* order negates any potential influences upon the review of the guidelines. The order additionally provides the public with an explanation for the modification, indicating committee recommendations as the basis and establishing a web page link for the public to obtain committee member information.⁶⁹ Furnishing such information would demonstrate a positive step for Mississippi's guidelines because, as the situation exists today, Mississippians have no means of monitoring state compliance with the federal and state mandated review.⁷⁰

Alabama takes a similar approach to the process, as its Legislature mandates that "[i]n making a determination of child support, the court shall apply Rule 32 of the Alabama Rules of Judicial Administration."⁷¹ Rule 32 sets forth that:

⁶⁸ ARK. CODE ANN. tit. 9, app. (Michie 1998) (emphasis added). Arkansas's method not only benefits from placing power within the judiciary, but also from employing an established review committee as mentioned earlier. By way of comparison, the Arkansas Supreme Court has modified its guidelines based upon committee recommendations several times over the years, while the Mississippi Legislature has never modified section 43-19-101 based upon DHS recommendations or otherwise.

⁶⁹ The members of the Committee on Child Support are listed at the following website: <http://courts.state.ar.us/courts/aoc.html#Boards>. There is no public record of the committee's findings or specific recommendations; however, the public could potentially gain access to this information by contacting the individual members.

⁷⁰ As mentioned earlier, Arizona offers a good example of providing this information. See *supra* note 65.

⁷¹ ALA. CODE § 30-3-155 (1998).

[t]he ADC shall, at least once every four years, review the child support guidelines and the schedule of basic child support obligations, to ensure that their application results in appropriate child support determinations. If the ADC determines that no change is required in the guidelines or in the schedule, the ADC shall so advise the Supreme Court.⁷²

Adopting the approaches employed by the aforementioned states will require a shifting of power from the legislature to the supreme court, which would reasonably meet some resistance. Yet in doing so, Mississippi would effectively shift the emphasis away from satisfying political interest and place it upon maintaining appropriate guidelines.

V. A COMPARISON OF SECTION 43-19-101 PERCENTAGES TO EXPENDITURES ON CHILDREN

The 1999 United States Department of Agriculture Annual Report compared expenditures on children by single-parent and husband-wife families nationwide. The study found that married families outspent one-parent families by only \$5820 per year.⁷³ Broken down into age ranges of birth to two years,

⁷² ALA. R. JUD. ADMIN. 32(G) (1996). The ADC refers to the administrative director of courts. Reiterating the point made earlier regarding the need for statistical data, the Supreme Court of Alabama emphasizes that

[t]hese guidelines are based on the income shares model developed by the National Center for State Courts and are founded on the premise that children should not be penalized as a result of the dissolution of the family unit but should continue to receive the same level of support that would have been available to them had the family unit remained intact. . . .

The Schedule of Basic Child Support Obligations was developed through research sponsored by the National Center for State Courts and is based on extensive economic research on the cost of supporting children at various income levels. This schedule is based on gross income and has been adjusted for Alabama's income distribution relative to the U. S. income distribution. It also incorporates the 1987 federal income tax provisions as well as the withholding schedule for Alabama state income tax.

ALA. R. JUD. ADMIN. 32 cmt.

⁷³ Search of United States Department of Agriculture, Expenditures on Children by Families, Center for Nutrition Policy and Promotion (Aug. 10, 2000). The reader should note that the study used the National Medical Expenditure Survey,

three to five years, six to eight years, nine to eleven years, twelve to fourteen years and fifteen to seventeen years for a one-parent family with a before-tax income of less than \$36,800, annual estimated child expenditures were \$5090; \$5770; \$6480; \$6070; \$6540; and \$7240 respectively.⁷⁴ For the same families and age groupings with incomes greater than \$36,800, the estimated annual child expenditures were \$11,680; \$12,550; \$13,340; \$12,880; \$13,690; and \$14,120.⁷⁵ Given this information, it is possible to analyze section 43-19-101.

Example 1 (only child scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. The noncustodial parent earned two-thirds of the income and the custodial parent earned one-third.

Adjusted Gross Income	Noncustodial (2/3)	One child with 14% Support	Expenditures on Single Child; 0-2 ⁷⁶	Difference Applied to Custodial Parent
\$20,000	\$13,333	\$1867	\$6872	\$5005
\$30,000	\$20,000	\$2800	\$6872	\$4072
\$40,000	\$26,666	\$3733	\$15,768	\$12,035
\$50,000	\$33,333	\$4667	\$15,768	\$11,101

conducted by the United States Department of Health and Human Services, and the United States Department of Agriculture food plans for determining food and health costs. Moreover, the study used a per capita approach for determining housing, transportation and miscellaneous goods and services costs, for which no research base exists. The per capita method allocates these costs among household members in equal shares.

⁷⁴ See *id.* tbl.7. The numbers reflected in the chart represent costs allocated to the youngest child in a two-child family.

⁷⁵ *Id.*

⁷⁶ The difference between \$30,000 and \$40,000, in amount of expenditures on a child by single-parent families, corresponds to the before-tax distinction made in the USDA annual report. Costs were estimated using \$36,800 as a dividing line. *Id.*

\$60,000	\$40,000	\$5600	\$15,768	\$10,168
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Example 2 (only child scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000 and \$60,000. Each parent earned equal amounts of income.

Combined Adjusted Gross Income	Noncustodial (1/2)	One Child with 14% Support	Expenditures on a Single Child; 0-2	Difference Applied to Custodial Parent
\$20,000	\$10,000	\$1400	\$6872	\$5472
\$30,000	\$15,000	\$2100	\$6,872	\$4772
\$40,000	\$20,000	\$2800	\$15,768	\$12,968
\$50,000	\$25,000	\$3500	\$15,768	\$12,268
\$60,000	\$30,000	\$4200	\$15,786	\$11,568

Example 3 (two children scenario):⁷⁷

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. The noncustodial parent earned two-thirds of the income and the custodial parent earned one-third.

⁷⁷ For the two-child scenarios, both children fall within the zero to two age group. The same age grouping was used for purposes of simplicity.

Combined Adjusted Gross Income	Noncustodial (2/3)	Two Children with 20% Support	Expenditures on Two Children; 0-2, ⁷⁸	Difference Applied to Custodial Parent
\$20,000	\$13,333	\$2667	\$9824	\$7157
\$30,000	\$20,000	\$4000	\$9824	\$5824
\$40,000	\$26,666	\$5333	\$22,542	\$17,209
\$50,000	\$33,333	\$6667	\$22,542	\$15,875
\$60,000	\$40,000	\$8000	\$22,542	\$14,542

Example 4 (two child scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. Each parent earned equal amounts of income.

Combined Adjusted Gross Income	Noncustodial (1-2)	Two Children with 20% Support	Expenditures on Two Children; 0-2	Difference Applied to Custodial Parent
\$20,000	\$10,000	\$2000	\$9824	\$7824
\$30,000	\$15,000	\$3000	\$9824	\$6824
\$40,000	\$20,000	\$4000	\$22,542	\$18,542
\$50,000	\$25,000	\$5000	\$22,542	\$17,542
\$60,000	\$30,000	\$6000	\$22,542	\$16,542

⁷⁸ To generate the annual expenditures on two children, the expenditure amount for the older child, within the zero to two age category, was multiplied by .93 and then summed with the estimated cost for the younger child. This method was outlined in the annual report.

Example 5 (three children scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. The noncustodial parent earned two-thirds of the income and the custodial parent earned one-third.

Combined Adjusted Gross Income	Noncustodial (2/3)	Three Children with 22% Support	Expenditures on Three Children; 0-2, 3-5 ⁷⁹	Difference Applied to Custodial Parent
\$20,000	\$13,333	\$2933	\$10,937	\$8004
\$30,000	\$20,000	\$4400	\$10,937	\$6537
\$40,000	\$26,666	\$5867	\$24,634	\$18,767
\$50,000	\$33,333	\$7333	\$24,634	\$17,301
\$60,000	\$40,000	\$8800	\$24,634	\$15,834

Example 6 (four children scenario):⁸⁰

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. The noncustodial parent earned two-thirds of the income and the custodial parent earned one-third.

⁷⁹ Two children fall within the zero to two age group, with the oldest child falling within the three to five age group. The estimated expenditures were reduced for the older children, added to the youngest estimate, then multiplied by .72 to derive the total estimated expenditures for three children.

⁸⁰ Two children fall within the zero to two age group, one falls within the three to five group and one falls within the six to eight group.

Combined Adjusted Gross Income	Noncustodial (2/3)	Three Children with 24% Support	Expenditures on Four Children; 0-2 3-5; 6-8 ⁸¹	Difference Applied to Custodial Parent
\$20,000	\$13,333	\$3200	\$15,276	\$12,076
\$30,000	\$20,000	\$4800	\$15,276	\$10,476
\$40,000	\$26,666	\$6400	\$33,567	\$27,167
\$50,000	\$33,333	\$8000	\$33,567	\$25,567
\$60,000	\$40,000	\$9600	\$33,567	\$23,967

Example 7 (four children scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. Each parent earned equal amounts of income.

Combined Adjusted Gross Income	Noncustodial (1/2)	Four Children with 24% Support	Expenditures on Four Children; 0-2 3-5; 6-8	Difference Applied to Custodial Parent
\$20,000	\$10,000	\$2400	\$15,276	\$12,876
\$30,000	\$15,000	\$3600	\$15,276	\$11,676
\$40,000	\$20,000	\$4800	\$33,567	\$28,767
\$50,000	\$25,000	\$6000	\$33,567	\$27,567
\$60,000	\$30,000	\$7200	\$33,567	\$26,367

⁸¹ The same process was applied as with the three children example to generate the estimated expenditures.

Example 8 (five children scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. The noncustodial parent earned two-thirds of the income and the custodial parent earned one-third.

Combined Adjusted Gross Income	Noncustodial (2-3)	Four Children with 26% Support	Expenditures on Five Children; 0-2 3-5; 6-8, 9-11 ⁸²	Difference Applied to Custodial Parent
\$20,000	\$13,333	\$3467	\$19,340	\$15,873
\$30,000	\$20,000	\$5200	\$19,340	\$14,140
\$40,000	\$26,666	\$6933	\$42,191	\$35,258
\$50,000	\$33,333	\$8667	\$42,191	\$33,524
\$60,000	\$40,000	\$10,400	\$42,191	\$31,791

Example 9 (five children scenario):

Assume that before separation, the custodial and noncustodial parents had combined gross incomes of \$20,000; \$30,000; \$40,000; \$50,000; and \$60,000. Each parent earned equal amounts of income.

Combined Adjusted Gross Income	Noncustodial (1/2)	Four Children with 26% Support	Expenditures on Five Children; 0-2 3-5; 6-8, 9-11 ⁸³	Difference Applied to Custodial Parent
\$20,000	\$10,000	\$2600	\$19,340	\$16,740
\$30,000	\$15,000	\$3900	\$19,340	\$15,440
\$40,000	\$20,000	\$5200	\$42,191	\$36,991

⁸² The same process was applied as with the three children example to generate the estimated expenditures.

⁸³ The same process was applied as with the three children example to generate the estimated expenditures.

\$50,000	\$25,000	\$6500	\$42,191	\$35,691
\$60,000	\$30,000	\$7800	\$42,191	\$34,391

The significance of the preceding examples is that each demonstrates a disparity between the amount of income appropriated by each parent for the child, strictly based upon the statutory percentages. Every example shows that the percentages place a larger burden upon custodial parents to provide for the needs of their children. In situations where the custodial parent accounted for one-third of the pre-separation income, the burden is even heavier, because the child expenditures constitute a greater percentage of those parent's income, as compared to the noncustodial parent. Thus, as the percentages exist today, they do not ensure that equitable support is being awarded from either a parental or a child perspective.⁸⁴ Accordingly, invocation of section 43-19-103, which allows for modification of awards based upon section 43-19-101 as unjust or inappropriate in a particular case, is required to negate this inequity.⁸⁵

VI. SEEKING AND SETTING OBJECTIVES

Just as military operations require well-defined goals and objectives, section 43-19-101 needs direction. The direction should come in the form of a legislative child support policy. The Legislature has phrased this in terms of equity, although section 43-19-101 does not set forth objectives for determining equitable support.⁸⁶ *Black's Law Dictionary* defines equity as

⁸⁴ MISS. CODE ANN. § 43-19-101(5) (2000).

⁸⁵ *Id.* § 43-19-103.

⁸⁶ For example, Alabama emphasizes:

[t]hese guidelines are based on the income shares model developed by the National Center for State Courts and are founded on the premise that children should not be penalized as a result of the dissolution of the family unit but should continue to receive the same level of support that would have been available to them had the family unit remained intact.

ALA. R. JUD. ADMIN. 32 cmt. (1996).

the body of Principles constituting what is fair and right.⁸⁷ Re-stated, the statute does not provide a framework for ensuring fair and right support. The American Law Institute provides Principles that would serve the Legislature well in adopting objectives and further defining equitable support.⁸⁸ In no certain order of priority, the Principles seek to reflect and achieve:⁸⁹

... that parents share income with a child in order that the child . . . enjoy a minimum decent standard of living . . . without impoverishing either parent and . . . not grossly inferior to that of the child's higher income parent; . . . that [both] residential . . . [and] that nonresidential parents be treated fairly ⁹⁰

Addressing the notion of providing single-parent children a minimum decent standard of living, the Principles note that parents are the primary guarantor of a child's economic well-being and are accountable for doing so, as long as they are economically able.⁹¹ Applied to section 43-19-101, holding non-custodial parents accountable for ensuring a child's standard of living obviously underscores an element of legislative hesitance to increasing the percentages. Studies have disclosed "not having enough money" as the greatest reason for not paying child support.⁹² However, this cannot be the true reason in cases where the noncustodial parent has income well in excess of the poverty level.⁹³ Where the noncustodial parent cannot afford

⁸⁷ BLACK'S LAW DICTIONARY 228 (Pocket ed. 1996).

⁸⁸ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.03 (Tentative Draft No. 3, Part II, 1998) [hereinafter ALI PRINCIPLES].

⁸⁹ The Principles established these objectives in recognition of competing values and interests. Importantly, preserving public funds and ensuring investment in children support a government role in the formulation of parental child support guidelines. *Id.* at 4.

⁹⁰ *Id.*

⁹¹ *Id.* at 11.

⁹² Laura Morgan, *Whose Money is it Anyway? A Custodial Parent's (Non) Duty to Account for Child Support*, 12 DIVORCE LITIG. 57 (2000) (citing Sumati Dubey, *A Study of Reasons for Nonpayment of Child Support by Non-custodial Parents*, J. OF SOC. AND SOC. WELFARE (1996)). Thirty-eight percent of the individuals polled stated that they didn't have enough money to pay child support.

⁹³ Politically speaking, constituent "inability" or aversion for potentially paying

to pay child support, the Principles suggest relief for that parent by invoking a graduated percentage of income for child support.⁹⁴ This suggestion comports with the Principles' objectives of treating each parent fairly, as well as avoiding impoverishing a parent. Because Mississippi has a low median family income, situations exist where the noncustodial parent cannot afford to pay according to the guideline percentages.⁹⁵ Mississippi recognizes these situations, as it allows deviations according to statute.⁹⁶ However, in general, the guidelines are presumed to be appropriate and should hold both parents responsible for child support in an equitable manner. Currently this is not the case because the custodial parent bears a disproportionate share of the economic burden for child expenditures.⁹⁷ One possible reason for this situation is that when states began adopting the guidelines, they were based upon expenditure levels below the USDA figures.⁹⁸ To get the most reliable data

more child support is a major impediment for increasing the child support percentages. See *supra* notes 46-47, 49-52, where legislation has repeatedly failed to increase the guidelines. Nationally, 70% of noncustodial parents have incomes at least twice the poverty line. Elaine Sorensen, *A National Profile of Nonresident Fathers and Their Ability to Pay Child Support*, 59 J. OF MARRIAGE & FAM. 785 (1997). Additionally, the United States General Accounting Office has determined that young noncustodial fathers have the ability to pay more child support than they are currently required to pay under state law. UNITED STATES GENERAL ACCOUNTING OFFICE, CHILD SUPPORT ASSURANCE: EFFECT OF APPLYING STATE GUIDELINES TO DETERMINE FATHER'S PAYMENTS, GOA/HRD-93-26 (1993). Mississippi's median family income in 1989 was \$24,448. Search of Database C90STF3A, U.S. Department of Commerce, Bureau of the Census, 1990 U.S. Census Data (October 9, 2000).

⁹⁴ ALI PRINCIPLES, *supra* note 89, § 3.09. Noncustodial parents should only pay the full percentage when their income is sufficient to provide a decent standard of living for them as the obligor. *Id.*

⁹⁵ It is unlikely that any child support guideline will decrease poverty or welfare dependence in situations where the parents are low-income. Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 177 (1999) (referring to ELAINE SORENSON, *THE BENEFITS OF INCREASED CHILD SUPPORT ENFORCEMENT, WELFARE REFORM: AN ANALYSIS OF THE ISSUES* 56-57 (1995)). Accordingly, child support policy offers the most benefits to the least needy. *Id.*

⁹⁶ See *supra* text accompanying notes 34-35.

⁹⁷ See *supra* text pp. 1084-91.

⁹⁸ Laura W. Morgan & Mark C. Lino, *A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines with Expenditures on Children Calculated by the U.S. Department of Agriculture*, 33 FAM. L.Q. 191, 217 (1999).

on expenditures within Mississippi, DHS should conduct sampling of single-parent families across the state or contract for a private study.⁹⁹ Otherwise, Mississippi should modify its percentages, taking into account the USDA figures, in an effort to minimize this inequality and embrace the Principles' notion of treating both parents fairly, while ensuring a child's minimum decent standard of living.

The Principles also give weight to the child's interest in a standard of living comparable with, and not grossly inferior to,¹⁰⁰ that of the noncustodial parent.¹⁰¹ The grossly inferior standard of living is presented in terms of income and Mississippi's current percentages facilitate gross inferiority, in the absence of deviations. Any occurrence of gross inferiority lends itself to perpetuating Mississippi's problems associated with child poverty.¹⁰² As mentioned earlier, Mississippi's Income-to-Needs Ratio indicates poverty among children residing in single-parent homes.¹⁰³ Consequently, the guidelines do not help alleviate this problem because they do not, without deviation, require the noncustodial parent to provide close to half of the estimated child expenditures for one-parent households.¹⁰⁴ Using examples one and two, on average, the custodial parent was responsible for providing 69.4% and 77.1%, respectively, of the child-rearing expenses. There are probably instances, considering the poverty numbers for Mississippi children residing in single-parent homes, where these expenses are either supported by public funds or children go without.¹⁰⁵

It is possible to argue that one way to minimize the dispar-

⁹⁹ Sampling is required in some states. See *supra* note 63 and accompanying text.

¹⁰⁰ The Principles recognize that prior to separation, the custodial parent provided primary care for the children at the expense of acquiring market skills and experience, and that upon dissolution, this parent potential for earnings is further handicapped because of parental responsibilities. ALI PRINCIPLES, *supra* note 89, § 3.03.

¹⁰¹ Establishing this standard of living requires that both parents share income with the child.

¹⁰² See *supra* notes 12-25 and accompanying text.

¹⁰³ See *supra* notes 8-11 and accompanying text.

¹⁰⁴ See *supra* text pp. 1084-91.

¹⁰⁵ See *supra* notes 4-5 and accompanying text.

ity between the custodial and noncustodial income-to-expenditure ratio is to reduce the total amount of expenditures. Any reduction of child expenditures would most likely come at the expense of health care, childcare and education or miscellaneous expenses.¹⁰⁶ Assuming that these elements were completely eliminated from the expenses and applied to example number one,¹⁰⁷ for the single-parent families with a before-tax income of less than \$36,800, these categories constitute 20.4% of the total annual expenditures. For those individuals above \$36,800, these categories constitute 32% of the expenditures. Subsequently, reducing the total expenditures in example number one by 20.4% and 32% results in the noncustodial parent contributing an average of 43.8% of the annual expenditures.

Further, the Principles suggest that accuracy is the sole concern for setting child support percentages. Accuracy is closely aligned with the federal desire for consistency. Accuracy is measurable in terms of the number of judicial deviations from the base or set percentages. Mississippi does not require consideration of this factor in reviewing the percentages, but by referring to the examples, it is apparent that deviation occurs often or the custodial parent could not meet the estimated child expenditures. Therefore, increasing the percentages would more closely reflect the costs associated with child rearing and, again, reduce the amount or need for deviation.

Past legislation has proposed increasing the percentages, but even those recommendations fail under such an accuracy test. Regardless, those increases would demonstrate a step in the right direction.

Incorporating into the statute the aims set forth in the Principles would create a guide for measuring equitable support. Focused in terms of these goals, the Department's percentage recommendations stand to gain further credibility

¹⁰⁶ In the USDA study, miscellaneous expenses included personal care items, entertainment and reading materials. *See supra* note 73. The other categories included in the annual estimated child expenditures were housing, food, transportation and clothing. *Id.*

¹⁰⁷ Example number one was used for purposes of simplicity to demonstrate a generalization of the validity of this argument.

above and beyond that previously alluded to regarding the use of statistical data. This is an important aspect that other states have built upon.¹⁰⁸ Mississippi should follow suit.

CONCLUSION

In form, section 43-19-101 represents a commitment by Mississippi to ensure the equitable allocation of child support. However, the statute lacks the substance to support this loosely defined goal. Statistics show that, in general, Mississippi's single-parent children suffer from income inequality and embody the negative effects associated with poverty. Child support can make a difference. Yet for section 43-19-101 to live up to its potential, Mississippi must consider alternatives, standardize its methods and basis for review, establish objectives and increase the percentages to reflect current child expenditures. The present state of the statute, and its failure to address the needs of Mississippi's children and parents, provides the catalyst for moving the Mississippi Legislature to action. Involving a wide range of citizens with varying backgrounds and expertise would not only generate a broader range of support, but also add credibility and stability to the process for review. Establishing basic statistical standards for setting and modifying the percentages would increase legislative confidence, provide DHS with a more powerful tool for suggesting modifications and create a foundation for further investigation. Perhaps giving the judiciary control over the guidelines is a better way of doing business. Whatever the option, change is overdue. Otherwise, in terms of the guidelines, Mississippi will continue to lose.

Jeffrey M. Williams

¹⁰⁸ See, e.g., ARIZ. REV. STAT. ANN. § 25-320 (West 2000 & Supp. 2001) (stating one purpose of statute is to establish standard of support consistent with reasonable needs of child and ability of parents to pay); CAL. FAM. CODE ANN. § 3900 (West 1994) (stating father and mother of minor child have equal responsibility to support child in manner suitable to his/her circumstances).

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